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CASES ON DAMAGES

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

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PROFESSOR OF LAW IN THE UNIVERSITY OF CHICAGO

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AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

ST. PAUL

WEST PUBLISHING COMPANY

1909

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MAY 28 1909

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TO

JOHN HENRY WIGMORE, A. M., LL. D.,

Dean of the College of Law of Northwestern University,

whose success as an author and teacher in the law comes as no surprise to one acquainted with his analytical and constructive genius, his untiring energy and enthusiasm, and the careful painstaking detail of his work.

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THE AMERICAN CASEBOOK SERIES.

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupsuposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

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the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

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treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

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If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. 2d " 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

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and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Dean of the University of Nebraska School of Law. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

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Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.*

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington Univeritl. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

The following books of the Series are now published, or in press: Partnership, by Eugene A. Gilmore, Professor of Law, University of Wisconsin; Criminal Law, by Wm. E. Mikell, Professor of Law, University of Pennsylvania; Damages, by Barry Gilbert, Professor of Law, University of Illinois; Conflict of Laws, by Ernest G. Lorenzen, Professor of Law, George Washington University; Trusts, by Thaddeus D. Kenneson, Professor of Law, University of New York.

JAMES BROWN SCOTT,
General Editor.

Washington, D. C., April, 1909.

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PREFACE.

ALTHOUGH the broad principles of the law of Damages are comparatively few, their application to specific causes of action takes us into every part of the wide domain of the common law. A study of the Measure of Damages must therefore be comprehensive in its scope, for the quantum of recovery is an important, even if a subsidiary, question in every successfully prosecuted action demanding a money judgment. A general principle of damages may therefore find its elucidation in a dozen different actions, which possess no other common element whatsoever. Thus the inquiry whether "gains prevented" are recoverable may arise equally in an action of tort for the detention, or for the negligent destruction, of property, upon trespass to realty, false imprisonment, deceit, or personal injuries, or in actions brought for breaches of the contracts of employment, marriage, sale, transportation, or what not. A court may be called upon to discuss the possibility of a recovery for mental suffering, now in an action for the disinterment or dissection of a human body, now in a case of personal injuries, seduction, assault, or slander, and now in an action for breach of a contract to carry, a contract to marry, or a contract to transmit a telegraphic message.

Thus, in illustrating the fundamental principles of the law of Damages, rules in specific causes of action, of necessity, also, are illustrated, but in such a way that the various elements of damage in any given cause of action are presented piecemeal, instead of as an entirety. To attempt, instead, to illustrate separately and successively the rules in the various kinds of actions likewise, of necessity, is to cross the path of the general principle, but also piecemeal and inadequately. To attempt to develop the general principle, and also to present the general measure of damages in specific causes of action, is thus in a way to traverse the same ground twice. Still the student must understand general principles, and again he ought to know the full measure of damages in every given action, and each as a complete and individual, though related, unit of knowledge. With these ideas in mind, the endeavor has been kept uppermost of presenting general principles as an entirety in the first part of the book, and the measure of damages in particular actions in the latter part.

This does not necessarily mean that a new case must be presented to illustrate each separate element of damage in a particular action. A case illustrating a general principle, and printed for this reason, but

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happening to involve the particular form of action considered, may be the best obtainable illustration therein as well, and fully illuminative. If this be grouped with, or correlated with, the other cases involving the given cause of action, entirety of presentation may be secured by bringing the case again to the student's mind upon the specific topic under examination. Therefore a number of cross-references have been embodied herein, in an attempt to unify the volume and to correlate the various general principles when the inquiry is directed toward the specific cause of action, and to illustrate amply, by application to particular situations, when the view is of the general principle. The volume, while divided into distinct portions, it is suggested, by reason of such inter-relation becomes one complete unit.

Again, many topics of the law of Damages, which ordinarily are discussed separately, are really allied. Thus Exemplary Damages and Aggravation shade into one another imperceptibly, and "Mental Suffering" is usually but another phase of the same matter. The courts often fail to distinguish between damages which are remote and those which are uncertain, and in many instances differentiation is difficult. These and other similarly related topics are treated in the time-honored fashion—separately—but the attempt is made to show their real inter-relation by means of cross-references. In the footnotes frequent citations will be found of other leading, instructive, or illuminative cases, which are not reprinted in full simply because of lack of space. They are suggested as additional material for reading by each student, but are not intended to supplant further suggestions by the instructor. Considerable liberty has been taken in cutting the cases reprinted. The necessary bounds of the book have necessitated the cutting of each case down to the lowest consistent limits. Long statements of fact, too, have been rewritten, and unnecessary citations of authority omitted.

The subject of Damages, possibly more than any other division of the law, is of relatively modern development. The jury in the early days exercised an almost complete control over the allowance of damages, subject to little officious intermeddling from the bench. Even at the beginning of the nineteenth century, the functions of the court and of the jury in the estimation of damages were not clearly established. It was not until quite recent times that the court undertook to prescribe definite rules which should restrain and guide the jury's rather arbitrary discretion. Hadley v. Baxendale, which is the very foundation case as to damages arising out of breach of contract, was not decided until 1854. In consequence it will be found that under many headings there is a dearth of material of an historical character. Many doctrines seem never to have given warning of their birth, but to have sprung "full-panoplied from the head of Zeus." An unusual number of the leading cases are American. The development of the law, too, in many topics (as, for example, in "Mental Suffering") is almost entirely American.

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In many other topics it will be found inexpedient (having a due regard to the purpose of this series as a whole) to include such historical matter as may exist, because to do so would be to invade the field of some other author. Thus, to present the general measure of damages in "Contracts" (under Part V herein), with particularity of developmental detail, would be to cover the entire subject of Breach of Contract and Quasi Contracts. To do so in "Conversion," or in "Direct and Consequential Damages," would be to develop important phases of the law of Torts. To do so in contracts concerning Realty would be to wander unduly in the field of Real Property. As Damages thus takes one the full round of the legal field, a wise discretion on the part of the compiler of a set of cases therein requires that he should constantly bear in mind the subsidiary character of his subject, and that he should keep his feet from unwarrantable trespasses.

These considerations will account for an apparently large number of modern cases in this collection.

The volume is an outgrowth of a book containing some 263 cases published by Mr. Mechem for use in his classes at the University of Michigan. No attempt was made therein to eliminate those portions of the cases that did not deal with questions of damages. One hundred and fifty of these cases, with all extraneous matter cut out, are now republished. For the exclusion of the other one hundred and thirteen cases omitted, for the entire rearrangement in scheme, outline, preface, and index, for the cutting of all the cases which are included, for the annotations, restatements of the facts, and cross-references, and for the selection of the one hundred and eighty-four new cases which have been added, the other collaborator must take entire responsibility.

Champaign, Nov. 3, 1908.

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CASES ON DAMAGES.

PART I.

DAMNUM ABSQUE INJURIA.

RANDALL v. HAZELTON et al.

(Supreme Judicial Court of Massachusetts, 1866. 12 Allen, 412.)

The declaration alleged, in substance, that the plaintiff owned an estate subject to a mortgage given by a former owner, containing a power of sale for nonpayment of interest; that the mortgagees informed plaintiff that they did not want the money paid when due, and he therefore made no provision to raise the money, but that the defendants secured an assignment of the mortgage by means of false representations as to plaintiff's desires, and proceeded to make a sale under the power granted in the mortgage; that plaintiff did not know of the sale until after it occurred, and was put to great expense in obtaining a deed of the estate and in regaining title.

COLT, J.[1] * * * The question raised by the demurrer is whether, upon the facts charged, the action can be maintained. It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur, there an action lieth. Baily v. Merrell, 3 Bulst. 95. Actions like the one under consideration are all based upon this proposition; but it cannot safely be applied as a test by which to determine whether the facts in any case constitute an actionable wrong, without keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false or does not know to be true, to another's loss or his own gain. Lobdell v. Baker, 1 Metc. 201, 35 Am. Dec. 358. So in reference to the term damage, the law is that it must be a loss brought upon the party complaining by a violation of some

[1] Part of the opinion is omitted, and the statement of facts is rewritten.

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legal right, or it will be considered as merely damnum absque injuria. There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequence of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish. The trouble and expense and risk of loss ought to and must be presumed to have been contemplated when the contract was entered into. The foreclosure of a mortgage under a power of sale, for example, may be made at such time and under such circumstances as to cause great distress and sacrifice to the mortgagor; but, whatever the motive of the mortgagee, no remedy is afforded for his oppressive conduct, if the requirements of the contract have been fulfilled. * * *

Demurrer sustained.

SPRING v. RUSSELL et al.

(Supreme Court of Maine, 1831. 7 Me. 273.)

MELLEN, C. J.[2] * * * Damnum absque injuria is not a legal novelty. It does not necessarily follow that because a plaintiff may have sustained a serious injury in his property, consequent upon the voluntary acts of a defendant, that, therefore, he has a right to recover damages for that injury. Some acts may be justified by an express provision of law; or the damage may have arisen as the consequence of those acts which others might lawfully do in the enjoyment and exercise of their own rights and management of their own business; or it may have resulted from the application of those principles by which the general good is to be consulted and promoted, though in many respects operating unfavorably to the interest of individuals in society. Other instances might be stated. Such is, and must be, the law of society. * * *[3]

[2] Part of the opinion is omitted.

[3] For instances of the application of the rule, see Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385 (1853), destruction of property to prevent spread of fire; Wilson v. Mayor of New York, 1 Denio (N. Y.) 595, 43 Am. Dec. 719 (1845), erection of public works; Howland v. Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442 (1845), pure accident; Mahan v. Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461 (1835), obstruction of lights, American doctrine; Penn Coal Co.

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v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445 (1886), lawful use of one's property; Jacobson v. Poindexter, 42 Ark. 97 (1883), loss in defending an action brought without malice; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522 (1876), reasonable use of highway; Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902), privacy; Rigney v. City of Chicago, 102 Ill. 64 (1881), access to realty; Pryce v. Belcher, 3 C. B. 58 (1846), 4 C. B. 866 (1847), political; Davis v. Jenkins, 11 Mees. & W. 745 (1843), erroneous suit at law; Churchill v. Siggers, 3 El. & Bl. 929 (1854); Savile v. Roberts, 1 Ld. Raym. 374 (1698), malice without harm; Eager v. Grimwood, 1 Exch. 61 (1847), seduction without proof of services; Hopkins v. G. N. R. R. Co., 2 Q. B. Div. 224 (1877), competition. And compare the cases herein under "nominal damages."

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PART II.

NOMINAL DAMAGES.

ASHBY v. WHITE.

(Court of Queen's Bench, 1703. 2 Ld. Raym. 938.)

HOLT, C. J.[1] The single question in this case is, Whether if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hinder'd to give it by the officer, if an action on the case will lie against such officer. * * *

I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there. And in these cases the action is brought vi et armis. But for invasion of another's franchise, trespass vi et armis does not lie, but an action of trespass on the case; as where a man has retorna brevium, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a publick nuisance, every one shall have his action, as is agreed in Williams's Case, 5 Co. 73a, and Westbury and Powell, Co. Li. 56a. Indeed where many men are offended by one particular act, there they must proceed by way of indictment, and

[1] Part of the opinion is omitted.

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not of action; for in that case the law will not multiply actions. But it is otherwise, when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case, per quod communiam suam in tam amplo modo habere non potuit; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway, every passenger shall not bring his action, but the party shall be pun ished by indictment; because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of Turner against Sterling the plaintiff was not elected, he could not give in evidence the loss of his place as a damage, for he was never in it; but the gist of the action is, that the plaintiff having a right to stand for the place, and it being difficult to determine who had the majority, he had therefore a right to demand a poll, and the defendant by denying it was liable to an action. If publick officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offenses. So the case of Hunt and Dowman, 2 Cro, 478, where an action on the case is brought by him in reversion against lessee for years, for refusing to let him enter into the house, to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be suppos'd. * * *

WELLER v. BAKER.

(Court of Common Pleas, 1769. 2 Wils. 414.)

This was an action of trespass on the case brought against the defendants for exercising without appointment the business of a dipper at certain medicinal springs, called Tunbridge Wells, at which the plaintiffs were officially named dippers. The plaintiff received as compensation only such sums as persons resorting to the wells chose to give them for their proffered services.

CURIA.[2] * * * Several objections were made by the counsel for the defendant; 1st, It was said, that there must be both an injury and a damage done to, and sustained by the plaintiffs, to support an action upon the case; in answer to this, we say here is both an injury and a damage; an injury, by the defendant's disturbing the dippers in the exercise of their right or employment, and a real damage in depriving them of some gratuity which they would otherwise have received, perhaps more than they might truly deserve for their labour and pains; besides an action upon the case will lie for a possibility

[2] Part of the opinion is omitted, and the statement of facts is rewritten.

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of a damage and injury; as for persuading A not to come and sell his wares at the market of B, the lord of the market may have this action.

2dly, It was said that this is not such an office or employment for which an assize would lie, and therefore this action will not lie; in answer, we think this may be an employment for life determinable upon misbehaviour; and if so, it is a freehold, has a certain place where it is to be exercised, and may be put in view to the recognitors; however we think it such an interest or employment that an action upon the case will lie against a stranger for a disturbance therein. * * *

WELLS v. WATLING.

(Court of Common Pleas, 1778. 2 W. Bl. 1233.)

Action on the case, tried at last Norwich Assizes, and verdict for the plaintiff, damages 5s., subject to the opinion of the court. The plaintiff declared on his possession of a messuage and lands in Banham, for which he was entitled to common of pasture on Banham Heath for his sheep levant and couchant, but that the defendant, on the 1st of January, 1777, and afterwards, wrongfully turned 3000 sheep thereon, whereby the plaintiff could not enjoy the benefit of his common in so ample a manner, etc. There was a second count, in which the plaintiff prescribed for his said right of common, and a third and fourth, in which the defendant was charged with surcharging the common with more sheep than he ought to have done. On Not Guilty, and issue thereon, the plaintiff proved, that his farm consisted of 300 acres in Banham; that Banham Heath consisted of 2000 acres, of which 50 lay in the parish of Winfarthing, and the rest in Banham; that the defendant's farm consisted of 32 acres in Winfarthing; that the plaintiff, and those whose estate he had, used to turn on from 100 to 300 sheep every year, but there was no evidence given, whether he turned on any in 1777; that in 1777 the defendant turned on above 100 sheep, besides lambs, on the Heath.

Walker, for the defendant, argued, that the plaintiff could not maintain this action for an injury, because he had suffered no damage; as it did not appear that he turned any sheep on the common that year. That the action of case does not lie for the mere act of turning on the sheep, but for the injurious consequences (if any) of turning them on. If water is diverted from my mill for ten years, and I do not use the mill during that whole time, no action lies. He cited, for this, Robert Mary's Case, 9 Co. 113a; Woolton v. Salter, 3 Lev. 104; Jackson v. Laverack, Viner, Common, (H. a), pl. 43. * * *[3]

BLACKSTONE, J. I always have understood, that an action on the case lay by one commoner against another for a great and exorbitant surcharge. It has been said by one of the counsel that the plain-

[3] Part of the report of the case is omitted.

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tiff must prove a serious injury, relying on the words of Mr. J. Blackstone. But the expression used by that Judge does not warrant such a construction; for it must be taken with a reference to the case then before him, which is proved to be the present case. It amounts to a kind of disseisin, and probably was so in the present case; for when the defendant had so grossly surcharged, the profit of the common was gone, and it was in vain for the plaintiff to turn in afterwards. Any act that will ground a per quod, and lessen the profit of the common, will support an action against the commoner. Any act that totally destroys the herbage, as feeding a common with rabbits, will support an action against the lord. Nor do I see anything singular, or repugnant to this, in the doctrine of Mary's Case. The commoner, says the book, must shew that "proficuum communiæ suæ per totum id tempus amisit"; or, "that he could not have his common in so beneficial a manner as before." It is not necessary he should have lost his common, but only the profits of his common; that is, that he could not take them so well as before.

NARES, J., of the same opinion. In the Case of the Dippers at Tunbridge Wells, 2 Wils. 422, it was held that a probable damage is a sufficient injury on which to ground an action.

PER TOT CUR. Judgment for the plaintiff.

DE GRAY and GOULD, JJ., also gave concurring opinions.[4]

MARZETTI v. WILLIAMS.

(Court of King's Bench, 1830. 1 Barn. & Adol. 415.)

This was an action of tort, brought by the plaintiff, a merchant, against defendants, his bankers, to recover damages for the dishonor of plaintiff's check. On the evening of December 17, 1828, plaintiff had a balance with defendants of £69. 19s. 6d. Shortly before 11 a. m. on the 19th he deposited £40 more. At 10 minutes past 3 that afternoon, a check, drawn by plaintiff, for £87. 7s. 6d., was presented for payment. The clerk to whom it was presented, not knowing of the last deposit, declined to pay the check, but it was paid on the following day. A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained.

LORD TENTERDEN, C. J. I think that the plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference, as to the consequences resulting from a breach of contract by reason of that contract being either express or implied. The only difference be-

[4] For other early cases, see Feize v. Thompson, 1 Taunt. 121 (1808); Barker v. Greene, 2 Bing. 317 (1824); Pindar v. Wadsworth, 2 East, 154 (1802); Blofield v. Payne, 4 Barn. & Adol. 410 (1833); Chandler v. Doulton, 3 Hurl. & C. 553 (1865); Cotterill v. Hobby, 4 Barn. & C. 465 (1825); Mellor v. Spateman, 1 Saund. 346 (1666); Taylor v. Hennikor, 12 Adol. & E. 488 (1840).

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tween an express and an implied contract, is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence. The attorney-general was compelled to admit, in this case, that if the action were founded on an express contract, the plaintiff would have been entitled to recover nominal damages, although no actual damage were proved. Now this action is, in fact, founded on a contract, for the banker does contract with his customer that he will pay checks drawn by him, provided he, the banker, has money in his hands belonging to that customer. Here that contract was broken, for the defendants would not pay the check of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case a plaintiff might, for the breach of that contract, have declared in assumpsit. So in Burnett v. Lynch, 5 Barn. & C. 589, the plaintiff might have declared as for breach of a contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages. At the same time I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shews that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers, that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his checks; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages. [5]

WEBB v. PORTLAND MFG. CO.

(Circuit Court of the United States, 1838. 3 Sumn. 189, Fed. Cas. No. 17,322.)

Bill in equity by Joshua Webb against the Portland Manufacturing Company to restrain the diversion of water from plaintiff's mill. On the stream on which the mill was situated were two dams, the distance between which was about 40 or 50 rods, occupied by the mill-pond of the lower dam. Plaintiff owned certain mills and mill privileges on the lower dam. Defendants also owned certain other mills and mill

[5] Other concurring opinions are omitted.
Accord: Rolin v. Steward, 14 C. B. 595 (1854).

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privileges on the same dam. To supply water to one of such mills, defendants made a canal from the pond at a point immediately below the upper dam. The water thus withdrawn by them for that purpose was about one-fourth of the water to which defendants were entitled as mill-owners on the lower dam, and was returned into the stream immediately below that dam.

STORY, J.[6] * * * I can very well understand that no action lies in a case where there is damnum absque injuria; that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that injuria sine damno is not actionable. See Mayor of Lynn, etc., v. Mayor of London, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right tending to diminish its value, but goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right, if no other damages are fit and proper to remunerate him.

[The court then cites and discusses the case of Ashby v. White, 2 Ld. Raym. 938.]

The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases. In the case of Ashby v. White, as reported by Lord Raymond, (2 Ld. Raym. 953,) Lord Holt said: "If the plaintiff has a right, he must

[6] Part of the opinion is omitted.

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of necessity have means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53.

The note of Mr. Sergeant Williams to Mellor v. Spateman, 1 Saund. 346a, note 2; Wells v. Watling, 2 W. Bl. 1233; and the case of the Tunbridge Dippers, (Weller v. Baker,) 2 Wils. 414,—are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, ego assentior scævolæ.

On the other hand, Marzetti v. Williams, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In Hobson v. Todd, 4 Term R. 71, 73, the court decided the case upon the very distinction, which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice Grose, in Pindar v. Wadsworth, 2 East, 162. But the case of Bower v. Hill, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for 16 years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for 20 years, it would become evidence of a renunciation and abandonment of the right of way. * * *

Upon the whole, without going further into an examination of the authorities on this subject, my judgment is that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and, if no other be proved, the plaintiff is entitled to a verdict for nominal damages; and a fortiori that this doctrine applies whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very

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ground of the interposition of a court of equity is that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity.[7]

DIXON v. CLOW.

(Supreme Court of New York, 1840. 24 Wend. 188.)

Action quare clausum fregit. On the 22d of April, 1832, the plaintiff by deed conveyed to one Garlicts a piece of land 100 feet long and 70 feet wide, with the privilege of taking water from the Cold Spring brook, which ran through plaintiff's farm, for the purpose of the erection of a waterworks. Defendant acquired Garlicts' title, and in the spring of 1838 entered and constructed a ditch through plaintiff's land, removing several lengths of fence. The plaintiff complains of these acts as exceeding the authority conferred by the grant.

The court instructed the jury that there was doubt whether a verdict might be found for the plaintiff, when he had not proved any sum as damages and had not offered any evidence as to the amount thereof. From a verdict for the defendant, the plaintiff appeals.

BRONSON, J.[8] The defendant has an easement in the plaintiff's land, and must be allowed to enjoy it in such a manner as will secure to him all the advantages contemplated by the grant. But he must so use his own privileges as not to do any unnecessary injury to the plaintiff. * * *

The case should I think, have been submitted to the jury to say, whether the acts of which the plaintiff complains were necessary to the enjoyment of the defendant's privileges, or whether he acted wantonly, and did an unnecessary injury to plaintiff.

If the plaintiff succeeded in showing an unlawful entry upon his land, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for nominal damages at the least. It was not necessary for him to prove a sum, or that any particular amount of damages had been sustained; and the charge was in this respect improper. From the pleadings and the course of the trial, it is evident that the action was brought for the purpose of trying the extent of the defendant's right. It is suggested,

[7] The principal case is commented on in Embrey v. Owen, 6 Exch. 353 (1851). It is clear that, whenever there is an injury to a right, which, if acquiesced in, would in the course of time create an adverse right in the wrongdoer, there an action is maintainable, without proof of any specific injury. Wood v. Waud, 3 Exch. 748 (1849); Hobson v. Todd, 4 Term R. 71 (1790); Pindar v. Wadsworth, 2 East, 154 (1802); Tyler v. Wilkinson, 4 Mason, 400, Fed. Cas. No. 14,312 (1827); Williams v. Mostyn, 4 Mees. & W. 145 (1838); Bower v. Hill, 1 Bing. N. C. 549 (1835); Moore v. Browne, Dyer, 319.

[8] Part of the opinion is omitted, and the statement of facts is rewritten.

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and is probably true, that a suit was first commenced in a justice's court, where the defendant pleaded title, and thus made it necessary for the plaintiff to sue in the common pleas. But however that fact may be, every unauthorized entry upon the land of another is a trespass, and whether the owner suffer much or little, he is entitled to a verdict for some damages.

Judgment reversed.

SMITH v. THACKERAH et al.

(Court of Common Pleas, 1866. L. R. 1 C. P. 564.)

Rule to show cause.

The plaintiff was possessed of a piece of land on which a building had been recently erected. The defendants, who were neighboring land-owners, dug a well on their own land near to that of the plaintiff, and afterwards filled up the well with such loose earth that the ground round it sank, and the plaintiff's building was injured, causing damage to the amount of £15. The jury found, in answer to questions by the chief justice, that the land of the plaintiff would have sunk if there had been no building on it, and that some particles of sand from it would have fallen onto the defendants' property, but that the plaintiff would have suffered no appreciable damage. A verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for such sum, under £15, as the court should direct, on the ground that the facts proved at the trial entitled the plaintiff to a verdict without proof of any pecuniary damage.

ERLE, C. J. I am of opinion that this rule should be discharged. There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land, or as in the case of Ashby v. White, 1 Smith, Lead. Cas. (5th Ed.) 216, interfering with his right to vote, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and, since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house, the noise of which may be inconvenient; but, unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act. In the case of Smelting Co. v. Tipping, 11 H. L. Cas. 642, 35 Law J. Q. B. 66, in which the defendant had set up some chemical works, the house of lords held that if the noxious vapors did not cause material damage to the plaintiff, he had no cause of action. In the present case, the digging the well and filling it up again were in themselves perfectly

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lawful acts, and the jury have found that they did no sensible damage to the plaintiff, and he has therefore no right of action.

BYLES, J. I am of the same opinion. In actions for a trespass, the trespass itself is a sufficient cause of action. But in actions for indirect injuries like the present, the judgment of the house of lords in Backhouse v. Bonomi, 9 H. L. Cas. 503, 34 Law J. Q. B. 181, shows that there is no cause of action if there be no damage, and I cannot distinguish between no appreciable damage to the land in its natural state and no damage at all.

MONTAGUE SMITH, J. I am of the same opinion. The mere subsidence of the surface of the soil is not necessarily an injury, and we are bound by the verdict of the jury, who found that in fact no appreciable damage would have occurred if these new buildings had not been on the land.[9]

PAUL v. SLASON.

(Supreme Court of Vermont, 1850. 22 Vt. 231, 54 Am. Dec. 75.)

On September 26, 1844, the defendant Francis Slason commenced a suit in the name of B. F. Langdon against the plaintiff, and the defendant Charles H. Slason, who was deputized to serve the writ, attached two cords of wood, two baskets, one pitchfork, two horses, one harness, one wagon, and some grain. The defendants also took a pitchfork of the plaintiff, but which had not been attached, and used it during the day in removing the grain. The plaintiff sued in trespass, and among other requests asked the court to charge the jury that, "if the jury found that the defendants took the plaintiff's pitchfork and used it during the day without right, he was entitled to recover its value, unless it were returned, and that, if returned, he was entitled to recover nominal damages." The court, however, charged the jury that if they believed, from the evidence, that the defendants took and carried it away, they should give the plaintiff its value; that if it was used and left upon the premises, so that the defendant received it again, and it was injured by the use, the plaintiff would be entitled to recover the amount of the injury; but that if they found, that it was merely used for a portion of a day in removing the plaintiff's property, there attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the

[9] Nominal damages are always recoverable, when a right has been invaded, for the protection of that right. Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732 (1871); Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (1845); Chapman v. Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401 (1839). And this is true, even though the invasion may have resulted in positive benefit. Jewett v. Whitney, 43 Me. 242 (1857); Murphy v. City of Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181 (1868), reported herein at page 394.

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use, they were not bound to give the plaintiff damages for such use. The jury returned a verdict for the defendants. Exceptions by plaintiff.

POLAND, J.[10] * * * Another question is also raised upon the charge to the jury in relation to the use of the pitchfork by the defendants. Under the charge, the jury must have found that the pitchfork was used by the defendants only in moving the plaintiff's property, that it was left where they found it, that the plaintiff received it again, and that it was in no way or manner injured. They were told by the court, that if they found all these facts proved, they were not obliged to give the plaintiff any damages for the fork.

It is true, that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrongdoer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrongdoer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done—because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right, or possession, is shown, and when not only all probable, but all possible, damage is expressly disproved.

The English courts have recently gone far towards breaking up the whole system of giving verdicts, when no actual injury has been done, unless there be some right in question, which it was important to the plaintiff to establish. In the case of Williams v. Mostyn, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and it was admitted that the plaintiff had sustained no actual damage or delay, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff for nominal damages. But, on motion, the court directed a nonsuit to be entered, saying that there had been no damage in fact or in law. So in a suit brought by the owner of a house against a lessee, for opening a door without leave, the premises not being in any way weakened, or injured, by the opening, the court refused to allow damages, and remitted the case to the jury to say, whether the

[10] Part of the opinion is omitted, and the statement of facts is rewritten.

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plaintiff's reversionary interest had in point of fact been prejudiced. Young v. Spencer, 10 B. & C. 145, [21 E. C. L. 70.] Mr. Broome, in his recent work on Legal Maxims, lays down the law in the following language: "Farther, there are some injuries of so small and little consideration in the law, that no action will lie for them; for instance, in respect to the payment of tithes, the principle which may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud, or intention to deprive the person of his full right."

If any farther authority is deemed necessary, in support of the ruling of the county court on this point, we have only to refer to that ancient and well established maxim—de minimis non curat lex—which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick, that the law should hold out no inducement to useless or vindictive litigation. Sedgwick on Dam. 62. This disposes of all the questions raised upon the charge.[11]

WARTMAN v. SWINDELL.

(Court of Errors and Appeals of New Jersey, 1892. 54 N. J. Law 589, 25 Atl. 356, 18 L. R. A. 44.)

VAN SYCKEL, J. In September, 1891, the clerk of the plaintiff in error, who was plaintiff below, drove the horse and carriage of the plaintiff to the sheriff's office in Camden, and there tied the horse to a post at the curb line of the street. While the clerk was in the sheriff's office, the lines, worth about three dollars or four dollars, were taken from the horse by the defendant in error, and the clerk was left without the means of driving the horse. He thereupon demanded the lines of the defendant, who refused to return them to him. The clerk then went to the office of the plaintiff, and informed him of the occurrence, and was instructed to return to the courthouse, and again demand the lines of the defendant. A second demand was made, and the defendant refused to comply with it. Thereupon the plaintiff brought suit against the defendant for damages. On the trial of the cause in the court below the plaintiff, after proving the facts above stated, rested his case. On the cross-examination of the plaintiff's clerk it appeared that the defendant said to him that the plaintiff had taken a small article from the defendant, and the clerk, in reply to the question whether the defendant did not take the lines by way of a joke, said he "supposed perhaps he did it in a joke, but he did not know what it was done for when it was first done." When the plain-

[11] The principal case is discussed in Fullam v. Stearns, 30 Vt. 454 (1857).

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tiff had rested his case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground de minimis non curat lex." The defendant thereupon tendered the lines to the plaintiff, and the court dismissed the jury from the further consideration of it. This disposition of the case is the error complained of in this court.

The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury, and settled by the court; nor, in my judgment, was the maxim de minimis non curat lex applicable to this case. In Seneca Road Co. v. Auburn & R. R. Co., 5 Hill (N. Y.) 175, Mr. Justice Cowen said this maxim is never applied to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied. A trespass upon lands is actionable, although the damage to the owner is inappreciable. The celebrated Six Carpenters' Case, reported in 8 Coke, 432, involved a trifling sum. But as the case in hand stood at the close of the plaintiff's testimony, I am not prepared to say that a verdict for substantial damages would not have been justifiable.

In my opinion, the trial court erred in dismissing this case, and the judgment below should therefore be reversed.[12]

CHAMBERLAIN v. PARKER.

(Court of Appeals of New York, 1871. 45 N. Y. 569.)

Action for breach of covenant to put down an oil well. On the 17th of February, 1865, Chamberlain & Knox leased to the defendant, all of their right, title and interest and claim on lot 26, Cornplanter run, Venango county, Pennsylvania. The lease was signed by both parties, and contained the following clause: "It is further expressly understood, that the party of the second part (defendant), is to put down a well to the depth of six hundred feet, by the 1st day of July next, unless detained by unavoidable accident, and to pay three dollars a cord for the wood standing on the lot."

ANDREWS, J. The instrument of February 17, 1865, called a lease, conveyed to the defendant all the interest of Chamberlain & Knox, in the premises described therein, and left in them no reversion but a

[12] See, also, Potter v. Mellen, 36 Minn. 122, 30 N. W. 438 (1886), deceit.

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right of entry merely, on breach of condition subsequent. The defendant, by accepting the conveyance, became bound to perform the stipulation on his part recited therein, although he had not signed it, and the right of re-entry being attached to the covenants, gave them the force of conditions. Co. Litt. 217, note; Rawson's Adm'r v. Copland. 2 Sandf. Ch. 251; Jackson v. McClallen, 8 Cow. 295.

It is not denied that the defendant wholly failed to perform his agreement to sink a well on the demised premises, and he became by such default liable to an action for a breach of the agreement. The only question in the case respecting the measure of damages was the amount which the plaintiff, as assignee of the grantor, was entitled to recover. The learned judge, before whom the case was tried, held that the measure of damages was the amount it would cost to sink a well on the premises to the stipulated depth, and the verdict was in accordance with the rule adopted by the court. It is the general rule that in actions for a breach of a covenant or contract, the plaintiff is entitled to recover what he has lost by the default of the defendant. The law seeks to give compensation and indemnity, and nothing beyond it. If there are some exceptions to this rule, it is not now material to notice them. Sedg. Dam. 204. The measure of damages is to be sought in the contract made by the parties, and where the amount of compensation is not fixed by the contract, then the natural approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of compensation. Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff, if the contract is broken. So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages, if the defendant omitted to perform the contract. In these and like cases, it is easily seen that actual pecuniary loss has been sustained in consequence of the default of the defendant.

But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although it could be seen that performance would have not benefited, but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defense to an action by the employer for a breach of the contract to show that the act to be done or the erection to be made, would injure the land or impair its value. The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value. A man may do what he will with his own, having due regard to the right of others, and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant who has been so employed and paid for building it, to say that his own performance would not be beneficial to the plaintiff. It is upon this general view of the subject, that the ruling of the

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court on the trial is sought to be maintained. The point to be considered, is whether the plaintiff in any sense, actual or legal, has lost by the default of the defendant a sum equal to the expense of digging the well. The lot embraced in the lease is located in the oil producing district of Pennsylvania, and the references in it show that the object of the lessee in taking it, was to develop the production of the oil which might be found thereon. The contract on his part to dig the well, so far as appears in the case, if performed, could result in no benefit to the lessor, except in the possible contingency, that after the well was dug, the default of the defendant in paying for the standing timber on the premises according to his undertaking in the lease, might enable them to re-enter on the premises. The whole production of the well, if oil should be found, would belong to the defendant for all time, unless the possible ground of forfeiture should occur, just suggested. If this contingency happened, it might be delayed until the supply of oil in the well was exhausted, and the possession of the well had become of no value. The loss or gain, in sinking a well was wholly the defendant's. It may be conjectured that the lessor had in view some advantage to other property in the vicinity, from the prosecution of the work of exploration by the defendant. There are no facts shown authorizing this inference, and such a ground of damages, if averred, would be speculative and conjectural, and could furnish no satisfactory basis for a recovery. The defendant was not paid for digging a well for the plaintiff on his premises. The well, when dug, would be upon the land of the defendant, and its product would be his.

It is idle to say, and the law does not require it to be said, in face of the obvious truth, that the lessors have been damaged to the extent of the cost of digging the well, by the defendant's default. Nor does the defendant gain any undue advantage. The lessor had the right to re-enter, upon the default of the defendant, and he was bound to pay for the wood according to the contract.

It is not probable that any authority can be found precisely in point; but the rule which has been held by the English courts in several cases, to the effect that in an action of covenant by lessor against lessee for non-repair of the demised premises under an unexpired lease, the proper measure of damages is not the amount required to put the premises in repair, but the amount in which the reversion is injured by the premises being out of repair, tends to support the conclusion that the rule of damages adopted in this case was erroneous. Doe v. Rowland, 9 Car. & P. 734; Smith v. Post, 9 Exch. 161; Turner v. Lamb, 14 Mees. & W. 412; Payne v. Champion, 16 Mees. & W. 541.

The plaintiff was, upon the proof given, entitled to nominal damages only.[13]

[13] In the absence of proof of damage, when the loss claimed is pecuniary, only nominal damages can be allowed. Jones v. Hannovan, 55 Mo. 462 (1874); Leeds v. Metropolitan Gaslight Co., 90 N. Y. 26 (1882); Skinner v. London

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STATE ex rel. LOWERY v. DAVIS et al.

(Supreme Court of Indiana, 1889. 117 Ind. 307, 20 N. E. 159.)

Lowery brought this action to recover upon the official bond of Davis, recorder of deeds of Madison county. The breach alleged was that Davis, in recording a deed from Lowery to another, had negligently entered a stipulation in that deed that the grantee should assume and pay a certain mortgage previously made by Lowery, to the extent of $500, as a stipulation to assume and pay it only to the extent of $200; and, the land having been sold again to one who was ignorant of the true amount, Lowery had lost his right to have the land charged with full amount. It was alleged also that the first grantee was insolvent, and that the plaintiff had been compelled to pay the $500. Upon the trial, however, there was no proof that the amount could not be collected from the grantee who had assumed it.

ELLIOTT, C. J.[14] * * * The jury returned a verdict in favor of the relator for $1, and his counsel insist that this finding decides all questions in his favor, and that, consequently, the assessment of the amount of recovery should have been at least $300. We cannot accept this theory. The recorder, who is guilty of a breach of duty, is only liable for nominal damages, unless the plaintiff proves an actual loss. It is quite clear, therefore, that a verdict for nominal damages does not necessarily decide all material questions in favor of the plaintiff, for, on the contrary, it really decides that he suffered nothing more than a nominal injury. A plaintiff cannot recover of a recorder and the sureties on his official bond more than nominal damages, unless he proves an actual loss, and to prove this he must show, in such a case as this, that he could not have collected the amount of his lien from the party who assumed to pay it. In other words, where a recorder negligently so records a deed reserving a lien as to make the amount of the lien $200, when it should be $500, he is not liable beyond nominal damages, unless the plaintiff proves that he cannot collect the full amount of the lien from the person who assumed its payment. If the person who undertook to pay remains liable and solvent, then the money must be collected from him, and not from the recorder and his sureties. * * *

M. A. Co., 14 Q. B. Div. 882 (1885); Flint v. Clark, 13 Conn. 361 (1839); Browne v. Price, 4 C. B. (N. S.) 598 (1858).

At least nominal damages are recoverable for breach of contract, as the plaintiff is injured in his right to have the contract performed. Owen v. O'Reilly, 20 Mo. 603 (1855); Hibbard v. W. U. Tel. Co., 33 Wis. 558, 14 Am. Rep. 775 (1873); Merrill v. W. U. Tel. Co., 78 Me. 97, 2 Atl. 847 (1886).

[14] Part of the opinion is omitted.

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JONES v. KING.

(Supreme Court of Wisconsin, 1873. 33 Wis. 422.)

LYON, J.[15] This is an action for slander. The complaint charges the speaking by the defendant, to and concerning the plaintiff, of certain slanderous words, imputing to the latter the committing of divers criminal offenses. The defendant, by his answer, denies the speaking of some of the slanderous words set out in the complaint, and admits the speaking of others of them, and alleges, by way of mitigation, that the plaintiff provoked him, by charging him with crime, and by applying to him grossly insulting epithets, to utter the language complained of. The evidence shows that the parties casually met, and engaged in a conversation, which at first was reasonably good-natured, but soon became an angry verbal altercation, in which vile epithets and charges of crime were freely hurled by each at the other. * * * The jury returned a verdict for the defendant, upon which, after a motion for a new trial had been overruled, judgment was rendered dismissing the complaint, with costs.

The plaintiff appeals, and his counsel claims that there should have been a verdict for nominal damages, at least, which, while it would have only carried nominal costs for the plaintiff, would have defeated the defendant's rights to recover costs. The claim of the learned counsel is doubtless correct. The speaking of words by the defendant, to and concerning the plaintiff, imputing to him a criminal offense, as charged in the complaint, is admitted by the answer. The plaintiff was therefore entitled to a verdict for at least nominal damages, without introducing any testimony, and without regard to the testimony which was introduced on the trial; and such verdict would have defeated the recovery of costs by the defendant. It should be observed that the circuit judge was not asked to charge, and did not directly charge, the jury that the plaintiff was entitled to a verdict for some damages. He did not say to the jury (as he well might) that the answer of the defendant admits, and also that the undisputed testimony proved, that actionable words were spoken by the defendant to and concerning the plaintiff, as alleged in the complaint. But the judge, in his charge, more than once refers to the speaking of such words, hypothetically. His language is, "If the words were spoken," and the like. Hence the verdict is not in disregard of the instructions of the court. It must also be observed that evidence of express malice on the part of the defendant seems to be entirely wanting in the case. In view of this fact, and of the uncontradicted testimony on certain other points (which it is unnecessary to specify), we are perfectly well satisfied that the plaintiff should have recovered no more than nominal damages. Indeed, we do not understand his counsel to claim

[15] Part of the opinion is omitted.

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that he is entitled to anything beyond that. We have before us, then, an action for slander, in which the verdict was for the defendant, but should have been for the plaintiff for nominal damages only, and in which it is not claimed that any rule of law has been violated by the court, in admitting or rejecting testimony, or in the instructions to the jury, or that the jury have disregarded the instructions of the court, or have behaved improperly. From these data we are to determine whether the plaintiff is entitled to a new trial of his action.

In Laubenheimer v. Mann, 19 Wis. 519, it was held that a judgment of nonsuit, although erroneous, will not be reversed, if it appear that the plaintiff is only entitled to nominal damages, if the case be one in which the defendant would recover costs, notwithstanding there is a judgment for nominal damages rendered against him. That was an action for a penalty, and was within the jurisdiction of a justice of the peace. Hence, had the plaintiff recovered nominal damages, the defendant would have been entitled to costs, the same as upon a nonsuit. In Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68, which was an action to recover damages for alleged breaches of the covenants of seisin and against incumbrances in a deed of land, the court followed the decision in Laubenheimer v. Mann, and refused to reverse a judgment dismissing the complaint, although it appeared that the plaintiff was entitled to recover, but only to recover nominal damages. The fact was entirely overlooked that such damages, in that action, would have entitled the plaintiff to costs. Hence, in Eaton v. Lyman, 30 Wis. 42 (which was also an action on the covenants contained in a conveyance of real estate), Mecklem v. Blake was overruled as to the point we are considering; and, it appearing that the plaintiff was entitled to nominal damages, we reversed a judgment of nonsuit against them. We are entirely satisfied with this decision, and believe that it establishes the correct rule in all actions sounding in contract to which it is applicable. But there is a class of actions denominated in the books "hard actions," to which a different rule has been applied in numerous cases. Of these actions, and of the rules relating to new trials which are applicable to them, a learned author says: "Hard actions strictly include only civil proceedings, involving in their nature some peculiar hardship, arising from the odium attached to the alleged offense, or the severity of the punishment which the law inflicts on the offender in the shape of damages. To this belong most actions arising ex delicto. Trespass, slander, libel, seduction, malicious prosecution, criminal conversation, deceit, gross negligence, actions upon the statute, or qui tam actions prosecuted by informers, and penal actions, prosecuted by special public bodies or the public at large, are ranged under this head. But as they partake, less or more, in their nature and effect, of prosecutions for criminal offenses, the rules that govern in granting or refusing new trials, and the reason of those rules, are drawn from criminal cases, rather than civil." 1 Grah. & W. New Tr. p. 503, c. 14. It is scarcely necessary to say

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that in criminal prosecutions, after trial and verdict for the defendant, a new trial is never granted. But the rule is not as broad in the class of civil actions mentioned above; yet in those actions it is much broader in favor of defendants than in other civil actions. In the volume last above cited, we find the following statement: "It is a general rule, with but few exceptions, that in penal, and what are denominated 'hard actions,' the court will not set aside the verdict, if for the defendant, although there may have been a departure from strict law in the finding of the jury." Page 353. And, again, on page 523: "In hard actions, a new trial will not be granted, especially if the verdict be for the defendant, although against evidence, nor unless some rule of law be violated." The author proves the correctness of the principles and rules thus laid down by him, by references to large numbers of cases, both English and American; and he satisfactorily demonstrates that, in a case like the present one, a new trial cannot be granted without a violation of well-settled rules of law. Perhaps as satisfactory a statement of the law on this subject as can be found is contained in Jarvis v. Hatheway, 3 Johns. (N. Y.) 180, 3 Am. Dec. 473. Judge Spencer there says: "In penal actions, in actions for a libel and for defamation, and other actions vindictive in their nature, unless some rule of law be violated in the admission or rejection of evidence, or in the exposition of the law to the jury, or there has been tampering with the jury, the court will not give a second chance of success." Add to these other conditions which exist in this case, to wit, that, at the most, the plaintiff is only entitled to recover nominal damages, and that the jury have not disregarded the instructions of the court, and there can be no doubt whatever that the motion for a new trial was properly denied by the court below. * * * [16]

[16] Adams, J., in Watson v. Van Meter, 43 Iowa, 76 (1876):

"In Hudspeth v. Allen, 26 Ind. 167, the court said: 'An omission to assess nominal damages, where there is a mere technical right to recover, is no ground for a new trial,' citing Jennings v. Loring, 5 Ind. 256. The same doctrine is held in Johnson v. Weedman, 4 Scam. (Ill.) 497. It is true that if the plaintiff is entitled to nominal damages for the purpose of establishing a permanent right, and the jury fail to assess such damages, a new trial should be granted. Plumleigh v. Dawson, 1 Gilman, 552, 41 Am. Dec. 199. The appellant's counsel claim that the nominal damages to which she is entitled are necessary to the determination of a question of permanent right. They say that by an undisputed user for ten years appellee would obtain an easement, and that judgment for nominal damages is one of the ways pointed out by law by which appellant can dispute such user, and prevent the same from ripening into an easement. This position would be well taken if the defendant, by his prior proceeding in the circuit court of April, 1874, did not obtain an easement; but we have already held that, notwithstanding the jury in that proceeding allowed this plaintiff no damages, the defendant did obtain an easement."

See, also, Flureau v. Thornhill, post, p. 562; Bain v. Fothergill, post, p. 564; Cohn v. Norton, post, p. 593, note; Lowe v. Turpie, post, p. 594.

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PART III.

LIQUIDATION OF DAMAGES.

ROY v. DUKE OF BEAUFORT.

(High Court of Chancery, 1741. 2 Atk. 190.)

The bill is brought to be relieved against a judgment obtained at law on a bond in the penalty of £100 and likewise excessive damages of forty pounds, and for a perpetual injunction.

The plaintiff was jointly bound with his son in a bond in the penalty of £100 that the son should not commit any trespass in the Duke's royalty, by shooting, hunting, fishing, &c. unless with the license of the game-keeper, or in company with a qualified person.

The son afterwards having catched two flounders, with an angling rod, in the Duke's royalty, the bond was put in suit against the plaintiff, and judgment for the penalty.*

Lord HARDWICKE, Ch.[1] * * * I am of opinion when these sort of bonds are given by way of stated damages between the parties, it is unreasonable to imagine they could only be intended as a bare security that the obligor should not offend for the future; was this the case, in what respect is a gentleman in a better condition, who has such a bond, than he was before, if, after he has obtained judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed. * * *

[The Lord Chancellor, however, did relieve against the penalty, because the son was "licensed or encouraged" in his act by the defendant's game keeper and made a "moderate use of his liberty."]

'ASTLEY v. WELDON.

(Court of Common Pleas, 1801. 2 Bos. & P. 346.)

By articles of agreement between the plaintiff and defendant it was agreed, on the part of the former, that he should pay the latter so much per week to perform at his theatres, with her travelling expences of removing from one theatre to another, except extra baggage; and on the part of the defendant, that she should perform at the theatres

* This statement is abridged from that of the official report.

[1] Part of the opinion is omitted.

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such things as she should be required by the plaintiff, and attend at the theatre beyond the usual hours on any emergency, and at rehearsals or be subject to such fines as are established at the theatres, and be at the theatre half an hour before the performances began, and abide by the regulations of the theatres, and pay all fines; and it was agreed by both parties, that "either neglecting to perform that agreement should pay to the other £200." Assumpsit upon this agreement, stating several breaches, and concluding to the plaintiff's damage of £200.

Verdict for £20.

Lord ELDON, C. J. When this cause came before me at nisi prius. I felt as I have often done before in considering the various cases on this head, much embarrassed in ascertaining the principle upon which those cases were founded: but it appeared to me, that the articles in this case furnished a more satisfactory ground for determining whether the sum of money therein mentioned ought to be considered in the nature of a penalty or liquidated damages than most others which I had met with. What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz. that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of Sloman v. Walter, 1 Brown, ch. cas. 418, did not stand in need of this principle; for there, by the very form of the instrument, the sum appeared to be a penalty; in which case a court of equity could never consider it as liquidated damages, but must direct an issue of quantum damnificatus. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract. This has been said to have been stated in Rolfe v. Peterson, 6 Brown Parl. Cas. 470, where the tenant was restrained from stubbing up timber. But nothing can be more obvious, than that a person may set an extraordinary value upon a particular piece of land, or wood, on account of the amusement which it may afford him. In this country, a man has a right to secure to himself a property in his amusements: and if he choose to stipulate for £5. or £50. additional rent for every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word "excessive" to the terms in which parties choose to contract with each other. There is, indeed, a class of cases, in which courts of equity have rescinded contracts on the ground of their being unequal. It has been held, however, that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it.

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Necessity in these cases seems to have obliged the courts to admit a principle nearly as loose as that to which I have before alluded. But with respect to the case of Ponsonby v. Adams, 6 Brown Parl. Cas. 417, the landlord may have set a value upon the residence of a particular tenant on his estate; and why should he not upon that ground have stipulated, that if such tenant should cease to reside there his rent should rise to £150.? Both in Rolfe and Peterson and in Ponsonby v. Adams, I should have said, that what was matter of contract bottomed on a good consideration, should not be looked upon as penalty, but should be considered as rent reserved, or liquidated damages. In Lowe v. Peers, 4 Burr. 2229, it is quite clear, that the breach of promise of marriage was to be compensated for in damages: it was a contract that in case the party failed to perform his promise, he should pay the sum of £1000. The case of Fletcher v. Dyche, 4 Term Rep. 32, is very strongly to the present purpose. In that case, a bond in a penal sum was conditioned to perform certain work within a certain time, or to pay £10. for every week beyond that time. The £10. per week was secured by the penalty of the bond; and to have said, that one term of a contract secured by a penal sum, should also be a penal sum, would have been absurd. Indeed, Lord Hardwicke, in Roy v The Duke of Beaufort, 2 Atk. 190, was of opinion, that a person who had entered into a bond with a penalty of £100. if he poached, must have paid the £100. if he had committed any act which amounted to poaching. But suppose the Duke had taken a bond in a penalty of £100. with condition that the obligor should not kill a partridge, or if he did, that he should pay £ 5., in that case it is most clear, that the £5. must have been considered as liquidated damages. With respect to the case of Hardy v. Martin, 1 Brown Chan. Cas. 419, I do not understand why one brandy merchant who purchases the lease and good will of a shop from another may not make it matter of agreement, that if the vendor trade in brandy within a certain distance, he shall pay £600.; and why the party violating such agreement should not be bound to pay the sum agreed for, though if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I much wish that the principle laid down by Lord Somers in Prec. in Chan. had been adhered to. Let us then see what this case amounts to. It was contended at the trial, that the last clause is not in the form of a penal bond. It is thus "and lastly, it is hereby agreed, that either party failing to perform their undertaking shall pay to the other £200." Prima facie this certainly is contract, and not penalty; but we must look to the whole instrument. In consideration of the defendant's services the plaintiff undertakes to pay her £1. 11s. 6d. per week, and also her travelling expences. It would be absurd to hold that, because the £1. 11s. 6d. is a liquidated sum, therefore the plaintiff could not be called upon for more, and yet that in consequence of his non-payment of the defendant's travelling expences, he should be liable to the whole sum of £200. because

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those expences are not ascertained. Again, there are many instances of the defendant's misconduct, which are made the subjects of specific fines by the laws of the theatre. Are we then to hold, that if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2s. 6d. or 5s., but if she offend in a case which has not been so provided for, she shall pay £200. I can find nothing in these articles, which can satisfy my mind judicially, that the £200. is to be paid in one case and not in the other. The clause is general, and contains no exception. If that be so, the case of Fletcher v. Dyche is an authority strongly in point. It therefore does appear to me, that the true effect of this agreement is, to give the plaintiff his option, either to proceed upon the covenants toties quoties, or upon the first breach to proceed at once for the £200. out of which he may be satisfied for the damage actually sustained, and which may stand as a security for future breaches.[2]

KEMBLE v. FARREN.

(Court of Common Pleas, 1829. 6 Bing. 141.)

TINDAL, C. J. This is a rule which calls upon the defendant to show cause why the verdict which has been entered for the plaintiff for £750., should not be increased to £1000.

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing October, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant £3. 6s. 8d. every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000., to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which breach, the jury, upon the trial, assessed the damages at £750.; which damages the plaintiff contends ought by the terms of the agreement to have been assessed at £1000.

[2] The opinions of Heath, Rooke, and Chambre, JJ., are omitted.

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It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1000. should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree.

In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3. 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of Astley v. Weldon, 2 B. & P. 346, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200., to be recovered in his majesty's courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages: there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think

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it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.[3]

ATKYNS v. KINNIER.

(Court of Exchequer, 1850. L. R. 4 Exch. 776.)

Action of covenant. The defendant covenanted, after the expiration of a partnership then being formed with the plaintiff, that he would not at any time practice the profession of surgeon, accoucheur or apothecary at No. 28 Dorset-Crescent or within two and one-half miles thereof, nor reside within such distance, and that in case he infringed such stipulation, he would "pay the sum of £1000 as and for liquidated damages and not by way of a penalty." It appeared that on the expiration of the partnership, the defendant went to reside at No. 44 Trinity-Square, Southwark. His residence was more than two and one-half miles from No. 28 Dorset-Crescent if measured by the public thoroughfare most frequented by carriages, but, if measured by another public thoroughfare along which carriages seldom passed, it was a few feet within two miles and a half. There was no evidence that the plaintiff had sustained any damage by reason of such residence and no allegation appeared that the defendant had engaged in practice. The jury under the direction of Rolfe, B., found a verdict for the plaintiff for £1000, leave being reserved to the defendant to move to reduce the damages to one shilling.

POLLOCK, C. B.[4] There will be no rule. We are to collect the meaning of the parties to the deed from the terms which they have used. Now the stipulation is express, that if the defendant shall practice or reside within two miles and a half from No. 28, Dorset-Crescent, measuring by the usual streets, he shall pay the plaintiff £1000. Here the defendant did reside within that distance, measuring by one of the usual ways, though he was beyond it according to another. I can conceive many cases where what may be called private policy may render it necessary for a party to guard against something which may be easily converted into a means of damage,—not because the act is of itself injurious, but because it is a sort of guard or fence, to prevent something else which is injurious from being done. * * *

PARKE, B. * * * The remaining question is, whether the plaintiff is entitled to recover the full amount of £1000. The rule of law, as

[3] See, also, Horner v. Flintoff, 9 Mees. & W. 678 (1842); Duckworth v. Allison, 1 Mees. & W. 412 (1836); Law v. Local Board [1892] 1 Q. B. Div. 127; Legge v. Harlock, 12 Q. B. 1015 (1848).

[4] Only parts of the opinions of Pollock, C. B., and Parke, B., are here given, and the statement of facts is rewritten.

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laid down in Kemble v. Farren, 6 Bing. 141 (which I cannot help thinking was somewhat stretched), was, that although the parties used the words "liquidated damages," yet, when the context was looked at, it was impossible to say that they intended that the amount named should be other than a penalty, inasmuch as the agreement contained various stipulations, some of which were capable of being measured by a precise sum, and others not; as, for instance, the plaintiff was to pay the defendant a certain weekly salary, which was capable of being strictly measured, and was far below £1000; therefore, upon a reasonable construction of the covenant, the words "liquidated damages" were to be rejected, and the amount treated as a penalty. That decision has since been acted on in several cases, and I do not mean to dispute its authority. Therefore, if a party agrees to pay £1000 on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty. In this case there is no pecuniary stipulation for which a sum certain of less amount than £1000 is to be paid, but all the stipulations are of uncertain value. Possibly this may have been a very imprudent contract for the defendant to make; but with that we have nothing to do. Upon the true construction of the deed, the amount is payable by way of liquidated damages, and not as a penalty.

JAQUITH v. HUDSON.

(Supreme Court of Michigan, 1858. 5 Mich. 123.)

The action was by Jaquith against Hudson on a promissory note. Hudson, by way of counterclaim, set up that on the dissolution of a partnership between himself and the plaintiff, Jaquith had agreed that he would not "engage in the mercantile business in Trenton for the space of three years from this date upon the forfeiture of the sum of $1000 to be collected by the said Hudson as his damages," but that Jaquith, in violation of this agreement, had entered into the mercantile business in Trenton within 80 rods of the old stand of Hudson & Jaquith and had continued in such business ever since. The jury allowed the defendant as his damages the sum of $1000 and the plaintiff appealed.

CHRISTIANCY, J.[5] * * * The second exception raises the single question, Whether the sum of one thousand dollars, mentioned in the covenant of Jaquith not to go into business in Trenton, is to be construed as a penalty, or as stipulated damages—the plaintiff in error

[5] Part of the opinion is omitted, and the statement of facts is rewritten.

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insisting it should be construed as the former, the defendant as the latter.

We shall not attempt here to analyze all the decided cases upon the subject, which were read and cited upon the argument, and which, with others, have been examined. It is not to be denied that there is some conflict, and more confusion, in the cases—judges have been long and constantly complaining of the confusion and want of harmony in the decisions upon this subject. But, while no one can fail to discover a very great amount of apparent conflict, still it will be found, on examination, that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case. And while there are some isolated cases (and they are but few), which seem to rest upon no very intelligible principle, it will be found, we think, that the following general principles may be confidently said to result from, and to reconcile, the great majority of the cases, both in England and in this country:

First. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained; considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him by the aid of the court, to extort more. It is the application, in a court of law of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained. This principle may be stated, in other words, to be, That courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy, as to make it rather matter of surprise that courts of law had not always, and in all cases, adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases.

This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties by express stipulation, or any form of language, however clear the intent, to set it aside; on the familiar ground, "conventus privatorum non potest publico juri derogare."

But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract.

The violation, or disregard, of this principle of compensation, may appear to the court in various ways,—from the contract, the sum men-

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tioned, and the subject-matter. Thus, where a large sum (say one thousand dollars) is made payable solely in consequence of the non-payment of a much smaller sum (say one hundred dollars), at a certain day; or where the contract is for the performance of several stipulations of very different degrees of importance, and one large sum is made payable on the breach of any one of them, even the most trivial, the damages for which can, in no reasonable probability, amount to that sum: in the first case, the court must see that the real damage is readily computed, and that the principle of compensation has been overlooked, or purposely disregarded: in the second case, though there may be more difficulty in ascertaining the precise amount of damage, yet, as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation, as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce.

We do not mean to say that the principle above stated as deducible from the cases, is to be found generally announced in express terms, in the language of the courts; but it will be found, we think, to be necessarily implied in, and to form the only rational foundation for, all that large class of cases which have held the sum to be in the nature of a penalty, notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages.

It is true, the courts in nearly all of these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious from these cases, that wherever it has appeared to the court, from the face of the contract and the subject-matter that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the negation of the one necessarily implies the existence of the other, there would seem to be no room left for construction with reference to the intent. It must, then, be manifest that the intention of the parties in such cases is not the governing consideration.

But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring, in substance, that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly, by reference to the subject-matter, that the parties have made the stipula-

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tion without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages, though they have so expressly declared. See, as an example of this class of cases, Kemble v. Farren, 6 Bing. 141.

Now this, it is true, may lead to the same result in the particular case, as to have placed the decision upon the true ground; viz., that though the parties actually intended the sum to be paid, as the damages agreed upon between them, yet it being clearly unconscionable, the Court would disregard the intention, and refuse to enforce the stipulation. But, as a rule of construction, or interpretation of contracts, it is radically vicious, and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they, in the most unambiguous terms, have declared it to be, and finds an intention directly opposite to that which is clearly expressed—"divinatio, non interpretatio est, quae omnino recedit a litera."

Again the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked, Whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty.

The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not, be made the real basis of these decisions. In endeavoring to reconcile their deci-

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sions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say "that the parties must be considered as not meaning exactly what they say." Horner v. Flintoff, 9 M. & W. 678, per Park, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?

The foregoing remarks are all to be confined to that class of cases where it was clear, from the sum mentioned and the subject-matter, that the principle of compensation had been disregarded.

But, secondly, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage, or what sum will amount to a just compensation. The reason, therefore, for allowing the parties to ascertain for themselves the damages in this class of cases, is the same which denies the right in the former class of cases; viz., the courts adopt the best and most practicable mode of ascertaining the sum which will produce just compensation.

In this class of cases, where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, Whether they have done so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter and often the situation of the parties with respect to each other and to the subject-matter, will be considered. Thus, though the word "penalty" be used (Sainter v. Ferguson, 7 M. G. & S. 716; Jones v. Green, 3 Y. & Jer. 299; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102), or "forfeit" (Nobles v. Bates, 7 Cow. [N. Y.] 307), or "forfeit and pay" (Fletcher v. Dycke, 2 T. R. 32), it will still be held to be stipulated damages, if, from the whole contract, the subject-matter, and situation of the parties, it can be gathered that such was their intention. And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of

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the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount.

It remains only to apply these principles to the case before us. It is contended by the plaintiff in error, that the payment of the one thousand dollars mentioned in the covenant of Jaquith is not made dependent solely upon the breach of the stipulation not to go into business in Trenton, but that it applies equally—first, to the agreement to sell to Hudson his interest in the goods; second, to sell his interest in the books, notes, accounts, etc.; and, third, to the agreement to dissolve the partnership. But we can perceive no ground for such a construction. The language in reference to the sale of the interest in the goods, books, notes, accounts, etc., and that in reference to the dissolution, is not that of a sale in futuro, nor for the dissolution of the partnership at a future period, but it is that of a present sale and a present dissolution—"does hereby sell," and "the copartnership is hereby dissolved," is the language of the instrument. It is plain, from this language, from the subject-matter, and from all the acts of the parties, that these provisions were to take, and did take, immediate effect. There could be no possible occasion to provide any penalty or stipulated damages for the nonperformance of these stipulations, because this sale and dissolution would already have been accomplished the moment the contract took effect for any purpose; and, until it took effect, the stipulation for the one thousand dollars could not take effect, or afford any security; nor would Hudson be bound or need the security. But it remained to provide for the future. If Jaquith were to be at liberty to set up a rival store in the same village, it might seriously affect the success of Hudson's business; and we are bound to infer, from the whole scope of this contract, that Hudson would never have agreed to pay the consideration mentioned in it, nor to have entered into the contract at all, but for the stipulation of Jaquith "that he will not engage in the mercantile business in Trenton, for himself or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by said Hudson as his damages." This stipulation of Jaquith not to go into business, is the only one on his part which looks to the future; and it is to this, alone, that the language in reference to the one thousand dollars applies. Any other construction would do violence to the language, and be at war with the whole subject-matter.

The damages to arise from the breach of this covenant, from the nature of the case, must be not only uncertain in their nature, but impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any. Their nature and amount could be better estimated by the parties themselves, than by witnesses, courts, or juries. It is, then, precisely one of that class of cases in which it has always been recognized as peculiarly appropriate for the parties to fix

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and agree upon the damages for themselves. In such a case, the language must be very clear to the contrary, to overcome the inference of intent (so to fix them), to be drawn from the subject-matter and the situation of the parties; because, it is difficult to suppose, in such a case, that the party taking the stipulation intended it only to cover the amount of damages actually to be proved, as he would be entitled to the latter without the mention of any sum in the contract, and he must also be supposed to know that his actual damages, from the nature of the case, are not susceptible of legal proof to any thing approaching their actual extent. That the parties actually intended, in this case, to fix the amount to be recovered, is clear from the language itself, without the aid of a reference to the subject-matter,—"upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages." It is manifest from this language that it was intended Hudson should "collect," or, in other words, receive this amount, and that it should be for his damages for the breach of the stipulation. This language is stronger than "forfeit and pay," or "under the penalty of," as these might be supposed to have reference to the form of the penal part of a bond, or to the form of action upon it, and not to the actual "collection" of the money.

It is, therefore, very clear, from every view we have been able to take of this case, that it was competent and proper for the parties to ascertain and fix for themselves the amount of damages for the breach complained of, and equally clear that they have done so in fact. * * *

KEEBLE v. KEEBLE.

(Supreme Court of Alabama, 1888. 85 Ala. 552, 5 South. 149.)

Plaintiff and defendant's testator had been in partnership in the mercantile business. Plaintiff sold out to defendant's testator, but was employed by the latter as business manager. The terms of the employment imposed on plaintiff the obligation to wholly abstain from the use of intoxicating liquors, and, in the event he should become intoxicated, that he should pay, "as liquidated damages," the sum of $1,000. The plea alleged that plaintiff violated his promise to keep sober, and thereby became bound to pay to defendant's testator said sum of $1,000, which sum was offered as a set-off to plaintiff's demand.

SOMERVILLE, J.[6] * * * The appellant violated his promise by becoming intoxicated, and remained so for a long time, and acted rudely and insultingly towards the customers and employés of the testator, and otherwise deported himself, by reason of intoxication, in such manner as to do injury to the business. It is not denied by appellant's counsel that this is a total breach of the promise to keep sober; nor is it argued that the damage resulting from the violation of

[6] Part of the opinion is omitted.

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such a promise can be ascertained with any degree of certainty; nor even that the amount agreed to be paid as liquidated damages, in the event of a breach, is disproportionate to the damages which may have been actually sustained in this case. But the contention seems to be that, inasmuch as it was possible for a breach to occur with no actual damages other than nominal, the amount agreed to be paid should be construed to be a penalty. * * * It is argued, in other words, that becoming intoxicated in private, while off duty, would be a violation of the contract, but would be attended with no actual damage to the business of R. C. Keeble & Co. This fact would, in our opinion, except the case from the operation of the rules above enunciated. There are but few agreements of this kind where the stipulation is to do or not do a particular act, in which the damages may not, according to circumstances, vary, on a sliding scale, from nominal damages to a considerable sum. One may sell out the good-will of his business in a given locality, and agree to abstain from its further prosecution, or, in the event of his breach of his agreement, to pay a certain sum as liquidated damages; as, for example, not to practice one's profession as a physician or lawyer, not to run a steam-boat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city. In all such cases, as often decided, it is competent for the parties to stipulate for the payment of a gross sum by way of liquidated damages for the violation of the agreement, and for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment. * * * It is clear that each of these various agreements may be violated by a substantial breach, and yet no damages might accrue except such as are nominal. The obligor may practice medicine, and possibly never interfere with the practice of the other contracting party; or law, without having a paying client; or he may run a steam-boat without a passenger; or an hotel without a guest; or carry on a newspaper without the least injury to any competitor. But the law will not enter upon an investigation as to the quantum of damages in such cases. This is the very matter settled by the agreement of the parties. If the act agreed not to be done is one from which, in the ordinary course of events, damages, incapable of ascertainment save by conjecture, are liable naturally to follow, sometimes more and sometimes less, according to the aggravation of the act, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the sum agreed on as a proper and just measurement, by way of liquidated damages, unless the real intention of the parties, under the rules above announced, designed it as a penalty. We may add, moreover, that no one can accurately estimate the physiological relation between private and public drunkenness, nor the causal connection between intoxication one time and a score of times. The latter, in each instance, may follow

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from the former, and the one may naturally lead to the other. There would seem to be nothing harsh or unreasonable in stipulating against the very source and beginning of the more aggravated evil sought to be avoided. * * *

MONMOUTH PARK ASS'N v. WALLIS IRON WORKS.

(Court of Errors and Appeals of New Jersey, 1893. 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626.)

The plaintiff brought an action in the supreme court against the defendant to recover $6,384.66, and interest, as a final balance for work done, chiefly, under a sealed contract between them, providing for the construction of a grand stand at the Monmouth Park race course. The articles of agreement contained the following provisions:

"In case the said party of the first part shall fail to fully and entirely, and in conformity to the provisions and conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereto, within the time hereinbefore limited for such performance and completion, or within such further time as, in accordance with the provisions of this agreement, shall be fixed or allowed for such performance and completion, the said party of the first part shall and will pay to the said party of the second part the sum of one hundred dollars for each and every day that they, the said party of the first part, shall be in default, which said sum of one hundred dollars per day is hereby agreed upon, fixed, and determined by the parties hereto as the damages which the party of the second part will suffer by reason of such default, and not by way of penalty." [7]

DIXON, J.[8] The first exception to be considered took its rise from the fact that the structure was not completed within the time limited by the contract, nor until 94 days after the expiration of a month's extension of that time. The defendant claimed a deduction or set off of $100 for each day's delay. * * * The plaintiff urged that the $100 a day was a penalty; and so the trial judge ruled, requiring that the defendant should prove the actual damages, and be allowed only for what was proved. To this ruling the defendant excepted. In determining whether a sum which contracting parties have declared payable on default in performance of their contract is to be deemed a penalty, or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g. more than the legal rate for the nonpayment of money, or that they have provided

[7] The statement of facts in the report of this case is here abridged.

[8] Part of the opinion is omitted.

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for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain, or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And if it be doubtful, on the whole agreement, whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text-books, and recognized in the judicial reports of this state. Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Whitfield v. Levy, 35 N. J. Law, 149; Hoagland v. Segur, 38 N. J. Law, 230; Lansing v. Dodd, 45 N. J. Law, 525. In the present case the default consists of the breach of a single covenant, to complete the grand stand as described in the approved plans and specifications within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand stand may be inferred from its cost—$133,000. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the noncompletion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions, therefore, seem to have been such as to justify the parties in settling for themselves the measure of compensation. The stipulations of parties for specified damages on the breach of a contract to build within a limited time have frequently been enforced by the courts. In Fletcher v. Dyche, 2 Term R. 32, £10 per week for delay in finishing the parish church; in Duckworth v. Alison, 1 Mees. & W. 412, £5 per week for delay in completing repairs of a warehouse; in Legge v. Harlock, 12 Q. B. 1015, £1 per day for delay in erecting a barn, wagon shed, and granary; in Law v. Local Board (1892) 1 Q. B. 127, £100 and £5 per week for delay in constructing sewerage works; in Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256, $10 a day for delay in erecting dwelling houses; and in Malone v. City of Philadelphia, 147 Pa. 416, 23 Atl. 628, $50 a day for delay in completing a municipal bridge,—were all deemed liquidated damages. Counsel has referred us to two cases of building contracts, where a different conclusion was reached: Muldoon v. Lynch, 66 Cal. 536, 6 Pac. 417, and Clements v. Railroad Co., 132 Pa. 445, 19 Atl. 274, 276. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascer-

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tainable, and the stipulated sum was unconscionable. In the case at bar we have no data for saying that $100 a day was unconscionable. The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages. Their language seems, indisputably, to have this meaning. They expressly declare the sum to be agreed upon as the damages which the defendant will suffer, they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages. But it is argued that as the contract authorized the engineer of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself, in liquidated damages, for delay in completing such a changeable contract. But this argument seems to be aside from the present inquiry, which is, not whether the plaintiff became responsible for damages by reason of the noncompletion of the grand stand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant. Certainly the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and consequently there may have been ground for considering the defendant's damages. If there was, the amount of the damages was adjusted by the contract at $100 per day. We think the ruling at the circuit on this point was erroneous. * * *[9]

WILLSON v. MAYOR, etc., OF BALTIMORE.

(Court of Appeals of Maryland, 1896. 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339.)

McSHERRY, C. J.[10] The mayor and city council of Baltimore, through the commissioners of public schools, advertised for sealed proposals for furnishing the schools of the city with desks and other necessary appliances. The bids were required to be made out upon forms which contained various stipulations. Among these, it was pro-

[9] See other important cases in Tennessee Manufacturing Co. v. James, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865 (1892); Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671 (1891); Keck v. Bieber, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846 (1892); Emery v. Boyle, 200 Pa. 249, 49 Atl. 779 (1901); Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475 (1891); Dakin v. Williams, 17 Wend. (N. Y.) 447 (1837); Williams v. Dakin, 22 Wend. (N. Y.) 201 (1839); Streeper v. Williams, 48 Pa. 450 (1865); Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713 (1857).

[10] Part of the opinion is omitted.

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vided that "the full name and address of a surety must be written on the proposal, and each proposal must be accompanied by a certified check for five hundred dollars, * * * said check to be payable to the mayor and city council of Baltimore. If the successful bidders enter into contract, with bond, without delay, their checks will be returned, as will those of the unsuccessful bidders. No proposal will be entertained which does not comply with the terms hereof." The appellant filled out one of these forms, specified the prices at which he would furnish the needed supplies, gave the name and address of his surety, and inclosed his certified check for $500, payable to the appellee. His bid being the lowest, he was awarded the contract; but, through no fault of his own, and though he acted in entire good faith, he was unable, in spite of his efforts, to furnish the signature of the surety he had named in his bid, and he failed, without being at all to blame, to secure any other surety on his bond. Thereupon the commissioners readvertised for bids, these being obtained and accepted. The new bids were for sums much less than those named by the appellant in his bid, and in consequence the city not only lost no money by the failure of the appellant to furnish a bond and to fulfill his contract, but in fact saved a considerable amount. The appellant then demanded the return of the $500 which he had deposited with his bid, but the city refused to surrender the money, and claimed the right to hold it. * * *

On the part of the appellant it is insisted that the $500 deposit was designed to be, and in reality was, a penalty, while on the part of the city it is claimed that the sum named was intended to be, and in fact was, liquidated or stipulated damages, which, for any breach of the appellant's bid or proposal, was to be retained by the city, without reference to whether the city had actually sustained any injury or not. The distinction between a penalty and liquidated damages is of the utmost importance, and upon the decision in any given case between them depends the question whether a sum stipulated to be paid upon a breach of the contract shall be treated as a debt, to be arbitrarily enforced, without regard to the actual loss, or whether, on the other hand, it shall be discarded, to let in an inquiry as to the extent of the damage really sustained in consequence of an omission or refusal to perform the agreement. If the sum designated is held to be liquidated damages, the only evidence necessary to warrant a recovery of that particular amount is that the contract to which it relates has been broken. But, if the sum is regarded as a mere penal sum, its place in the contract gives it no weight, and a recovery for a breach of the undertaking will be limited to the extent of the loss or injury actually sustained and proved. In the one instance, therefore, the whole of the sum is recoverable, when there has been a default, though the actual damages be nominal, while in the other only such damages as have been really incurred, and are satisfactorily shown, can be assessed and awarded for a breach. It is obvious, then, that the pending contro-

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versy turns upon the question whether the $500 deposit is liquidated damages, or a penalty. If it be the former the plaintiff has no right to recover it back, but if it be the latter the city cannot lawfully retain it, except to the extent that actual damage has been sustained. * * *

A sum, if it be at all reasonable, and is stipulated to be paid as liquidated damages for the breach of a contract, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are wholly uncertain, and cannot be ascertained upon an issue of fact. A common instance is the case of agreements between professional men, binding a retiring partner, or an apprentice or clerk, not to interfere with the business of the other. * * * But a stipulation to pay a specified sum upon the nonperformance of a contract is regarded as a penalty, rather than as liquidated damages, if the intention of the parties as to its effect is at all doubtful, or is of equivocal interpretation. * * * And such a stipulation is generally regarded as a penalty, in the absence of a clear indication of a contrary intention by the parties at the time the contract was executed, where the agreement is certain, and the damages for a breach thereof are easily and exactly ascertainable. * * * Finally, the tendency of late years has been to regard the statements of the parties as to liquidated damages in the light of a penalty, unless the contrary intention is unequivocally expressed, so that harsh provisions will be avoided, and compensation alone will be awarded.

Now, it will be observed that the contract between the appellant and the appellee, evidenced by the bid filed and accepted, has not a word in it descriptive of the $500 deposit as either liquidated damages or a penalty. It is clear, therefore, that the parties themselves have not, by any term or provision of the agreement, declared that the deposit shall be either the one or the other, but have left the question at large; and it is equally clear that there is nothing in the subject-matter of the agreement which imperatively requires that the deposit be characterized as liquidated damages, especially as the decided inclination of the courts, in doubtful cases even, is to treat the stipulated sum as merely a penalty. Indeed, there is no explicit forfeiture of the deposit at all. The contract provides simply that "if the successful bidders enter into contract, with bond, without delay, their checks will be returned"; but it is nowhere expressly declared that a failure to enter into bond shall entitle the city to the whole amount of the deposit, or to any part of it, though it is palpably implied that so much of it as will be a just compensation for any loss that may result to the city from the failure of the bidder to furnish the bond was, in view of the whole subject-matter, designed by the parties to be applied by the city to its own reimbursement. But, beyond this, the exact amount of loss which would result to the city by the failure of a bidder to give the required bond is capable of definite and precise ascertainment.

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A failure to give the bond is a breach of the contract, and the damages which would result from that breach would be the amount the city paid, if anything, in excess of the amount of the unexecuted bid, and also the expenses of a readvertising for new bids. These elements of damage are neither uncertain, nor difficult of ascertainment by a jury, and this fact is one of the recognized tests resorted to for distinguishing between liquidated damages and a penalty. Geiger v. Railroad Co., 41 Md. 4. Not only, then, is there no provision expressly declaring this deposit to be liquidated damages, but to treat it as such would require the superaddition, by implication, of a distinct term to the contract, which is not permissible, and the reversal of the doctrine that courts lean strongly against upholding a specified sum as liquidated damages where such an interpretation is of doubtful accuracy and leads to manifest injustice. That an interpretation which treats this deposit as liquidated damages would, to say the least, be of doubtful accuracy, cannot be disputed. That it would be unjust, in this particular case, in its results, is scarcely open to discussion. The appellant is conceded to have acted in perfect good faith. The city has not only not lost anything by his failure to give the bond, but it has actually gained thereby a considerable sum; and it would be unconscionable (Cutler v. How, 8 Mass. 257) under these conditions, for it to retain the $500 as stipulated and liquidated damages for a technical breach which has occasioned no appreciable injury. We discover nothing on the face of the contract, nothing in all the surrounding circumstances on the subject-matter, and nothing in the rules of law, which will justify us in holding this deposit to be liquidated damages, unless the remaining proposition to be considered sustains the appellee's contention. That proposition is that where a sum is deposited, either with a third person, or with the other party to the contract, it is invariably treated as liquidated damages; and the cases of Wallis v. Smith, 21 Ch. Div. 250, Hinton v. Sparkes, L. R. 3 C. P. 161, and some others, have been referred to. * * * These cases, and others to which allusion might be made, relate to a different class of contracts. Where parties contract, as they frequently do by a condition of sale, that the deposit money shall be forfeited if the purchaser fail to carry out his contract, the deposit cannot, nor can any part of it, be recovered back on the ground that the forfeiture was in the nature of a penalty, and the actual loss to the vendor was less than the amount of the deposit. In fact, the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit, which is in reality not a pledge, but a payment in part of the purchase money, Wood, Mayne, Dam. § 245; Sugd. Vend. c. 1, §§ 3, 18. * * *

It is stated with great clearness and accuracy by Mr. Brantly, in his admirable work on the Law of Contract (page 192), that, "when it is provided that the sum deposited in part performance of the contract is to be forfeited upon failure of the party to complete it, such sum, if not excessive, is liquidated damages." Conversely, if the deposit

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be not made in part performance of the contract, but be collateral to the contract, and a mere guaranty that its provisions will be observed, and if the making of the deposit is not a part of the thing to be done under or in execution of the contract, but is required simply and solely as a condition precedent to entering into the contract, which distinctly relates to something else, then, obviously, such a deposit would not be treated as liquidated damages merely because it is a deposit, but would be either liquidated damages, or a penalty, as the rules applicable to such a question might cause the court to determine.

We are not prepared to expand the doctrine relating to deposits made on the purchase of land by applying it to contracts of the character now before us. The deposit in the case at bar, when made, was not part of a sum ultimately payable, under the contract, to the city by the appellant, nor was it set apart, either in express terms or impliedly, to meet an obligation arising out of a purchase; but it was designed to serve precisely the same purpose that a guaranty or other indemnity would have done,—to save the city harmless from any actual loss which might arise or grow out of a failure on the part of a bidder to furnish a bond conditioned for the performance of his accepted proposal. It would introduce a sweeping departure from established principles to hold, as an unbending rule applicable alike to all contracts, no matter what their nature or subject, that a deposit made to secure their due performance must invariably be treated as liquidated damages, and never as a penalty. Such a rule would, in its application, ignore or arbitrarily override all other principles of interpretation, and would force courts to regard as liquidated damages sums which obviously would not, according to the canons of construction to which we have alluded, ordinarily be so considered. * * *

Finally it was insisted that when an agreement is in the alternative —to do some particular thing or to pay a given sum of money—the court will hold the party failing to have had his election, and compel him to pay the money. Railroad Co. v. Reichert, 58 Md. 278, and Sedg. Dam. § 423, were relied on to support this doctrine. The case in 58 Md. certainly does lay down the rule contended for, but the state of facts to which the rule was there applied is totally different from the facts of this case. There Reichert owned a coal yard, and a trestle connecting it with a railroad. Another railroad company, needing part of his land for the construction of its road, condemned it. The construction of its road required that the trestle should be removed. The jury of condemnation awarded $600 damages, and further awarded that the condemning road should erect for Reichert another trestle, and then provided in the inquisition that upon its failure to comply it should pay the further sum of $1,500. This inquisition was accepted by both parties, and was ratified by their consent. The railroad company then neglected to build the trestle, and Reichert brought suit. This court held that the award of $1,500 was not a penalty; that the jury of inquisition had fixed the sum to be paid if

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the company failed to construct the trestle; and that the alternative thus given and accepted by the agreement of the parties bound the company to perform the conditions upon which it took Reichert's property, or to pay the sum which the jury fixed, and the parties agreed to, in lieu of a compliance with the inquisition. There is in the pending case no alternative agreement at all,—certainly no express or unequivocal one; and, before the doctrine sanctioned in 58 Md. can be applied, there must, by sheer construction, be imported into the proposal or bid which the appellant made a term that is not there now,—a stipulation either to sign the bond with a surety, or to pay $500. For the purpose of declaring the deposit to be liquidated damages, the contract actually made would have to be changed into a totally different agreement. This, of course, cannot be done. * * *

FRASER et al. v. LITTLE et al.

(Supreme Court of Michigan, 1865. 13 Mich. 195, 87 Am. Dec. 741.)

MARTIN, C. J. This action is for the recovery of the penalty of a bond executed by Fraser and Raymond in the penalty of $800, conditioned that one Robertson should prosecute to effect an action of replevin then commenced by him against the defendants in error, Little, Hess, and Boutell. It appears that Robertson was defeated in his action, and judgment rendered against him for the value of the property replevied by him, viz. for $1,753.73. I do not learn from the bill of exceptions that any execution was issued upon such judgment, and returned as unsatisfied wholly or in part, nor that any effort was made to collect from Robertson the amount of such verdict. In this action, the court rendered judgment against Fraser and Raymond for the penal sum of the bond, with interest (called damages for the detention of the sum of $800) from the rendition of the judgment in the action of replevin, amounting in all to the sum of $1,010.31. The error assigned is that the court rendered judgment for an amount exceeding the penal sum mentioned in the bond. I think this error is well assigned. The obligation of the plaintiffs in error arose upon no consideration received by them, or benefit which could accrue to them. It was purely voluntary, to satisfy the statute, and enable Robertson to prosecute his action of replevin. The statute requires such bond to be in a sum at least double the appraised value of the property replevied. This statute, I think, fixes the limit of the sureties' liability, so that in executing a bond as surety we must understand that he intends and only undertakes to become liable to the extent of the penal sum mentioned, and no further, and that the statute requires nothing more from him. Although there are conflicting authorities upon this question, yet it seems to me that upon no principle of equity or justice can a surety upon such a bond, given under such circumstances

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and statutory requirements as the bond in this case was executed, and without any consideration received for it, or resulting benefit to spring from it, be held beyond the sum "nominated," and cast in damages, for no default of his own. The remedy of Little and others for any excess of damages over the $800 is exclusively against the plaintiff in the action against them. Fraser and Raymond risked $800, and no more, and there could be no default upon their part by reason of the failure of the plaintiff in the replevin suit, or otherwise, which could increase the penal sum of the bond, or impose upon them a greater liability than the one assumed. The statute, as above remarked, having required the bond to be at least in double the appraised value of the property replevied, they had a right to suppose, and it would be a reasonable and natural presumption, that the penal sum fixed in the bond would and should cover all exigencies so far as affected their liability.

I think the judgment should have been for the sum of $800 only, and that the judgment of the circuit court should be reversed, and a new trial ordered.

CAMPBELL, J.[11] The only question in this case is whether judgment can be given on a replevin bond for more than the penalty and costs. The action was an action of debt on a bond in the penalty of $800, and judgment was rendered for an additional sum of $210.31 by way of damages for its detention, in addition to costs of suit.

I think there is no foundation for any such judgment. Where a bond or specialty is given in the amount actually due, and not in a penalty, there is no reason and no rule which will prevent a recovery of interest on the actual debt, for which the bond is only an evidence under seal. But where an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never became the actual debt, except by way of forfeiture, and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases cited on the argument from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon forfeiture, are entirely unsupported, and would probably never have been made had not the actual debt in these cases equaled or exceeded the penal sum. As authorities, they are based upon a false assumption, and cannot be maintained on any such principle. In England, the rule of liability upon bonds in a penalty has been almost entirely uniform, and the only cases extending it beyond the penalty and costs have been overruled and disregarded. The cases are collected in Hurl. Bonds, 107, 108, and the rule is there laid down in conformity with the prevailing authorities. The decisions supposed to favor another doctrine, as applicable to suits brought directly upon

[11] Part of the opinion of Campbell, J., together with the dissenting opinion of Christiancy, J., is omitted.

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bonds, are Francis v. Wilson, Ryan & M. 105, and Lonsdale v. Church, 2 Term R. 388. In the former case the bond was not, in any proper sense, a penal bond, as the penalty was in the exact amount of the debt mentioned in the condition, which was made expressly to carry interest. It was apparent that the sum mentioned could not be legally treated as a penalty, and the court properly enforced it as a simple money bond or specialty. Lonsdale v. Church, supra, is more directly in point, as the court refused to allow a defendant, on paying into court the penalty and costs, to obtain a discharge, and Buller, J., denied that the penalty of a bond limited the recovery. But this judge seems to stand alone in maintaining the doctrine. Very shortly before, in White v. Sealy, 1 Doug. 49, he had, on the hearing of a similar application, expressed a similar opinion, but he finally concurred with his brethren in holding that he had been mistaken. In Knight v. McLean, 3 Brown, Ch. 496, sitting in an equity cause, he allowed interest beyond the penalty of a bond, but was overruled by Lord Thurlow, who held that there could be no such allowance, and that the rule was the same in equity as at law. In Wilde v. Clarkson, 6 Term R. 303, the doctrine of Lonsdale v. Church, supra, was expressly repudiated and overruled. In Hefford v. Alger, 1 Taunt. 218, the former cases were referred to, and Lord Thurlow's opinion approved; and in Branscombe v. Scarbrough, 6 Q. B. 13, where an action was brought on a replevin bond which was very much too small to secure the judgment, the court said that granting a rule to show cause why an allowance should not be made beyond the penalty and costs would be creating a doubt where no doubt existed. It cannot be said that under the English common-law decisions there is any room for controversy on the subject. It is only where a suit is brought on some judgment already rendered on a bond, as in Blackmore v. Flemyng, 7 Term R. 446, and McClure v. Dunkin, 1 East, 436, or where an action is brought upon some distinct covenant in a bond or other obligation, that the penalty becomes unimportant; but even in such cases the penalty is not made the debt on which interest runs. The right to a decree in equity beyond the penalty of a bond is denied as clearly and consistently as at law. Where a debt is secured as such by other securities besides a bond, the fact that a bond has been taken will not usually affect the remedy on the other obligations. But there is no authority for allowing any recovery or account beyond the penalty when the bond becomes material. The only cases where a different result has been reached are where the bond debtor has resorted to equity to obtain relief from legal proceedings; and then it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to the jurisdiction of equity, to do what was just under the circumstances, and not to reap advantage from a delay which he has compelled his adversary to undergo. * * *[12]

[12] See, also, Philbrook v. Burgess, 52 Me. 271 (1863).

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WYMAN v. ROBINSON et al.

(Supreme Judicial Court of Maine, 1882. 73 Me. 384, 40 Am. Rep. 360.)

PETERS, J.[13] The important question presented by this case is whether, in an action upon a replevin bond against principal and sureties, when the damages exceed the penalty of the bond, the recovery must be limited to the penalty, or whether it may exceed the penalty so far as to include interest upon the amount of the same from the date of the breach of the bond. We think the reasonable doctrine to be that, so far as necessary to secure the damages sustained by the obligee, the recovery may go beyond the sum of the penalty, by allowing interest on such sum from the date of the breach; such interest not to be considered as any part of the penalty, but as damages for the nonpayment or detention of the penalty after it becomes payable and due.

It is commonly said that the damages cannot exceed the penalty of a bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach.

After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule common to contracts generally applies,—that where money is due, and there is a default in payment, interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs.

In some cases courts appear to have been reluctant to allow the interest to commence before the date of the writ upon the penal bond. But why not, logically, from the default as well as from the date of the writ? Interest is allowable from the date of a writ only because a defendant is considered in default from that date. Why not to be reckoned from an earlier date, if the default antedates the writ? In

[13] Part of the opinion is omitted.

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some cases, of course, it would not; in this case it does. It might as well be urged that the costs of an action upon a bond should not be allowed as that no interest should be, where the costs would carry the execution beyond the penalty named in the bond; for costs are as much of the nature of a penalty as interest is when interest is allowed as damages.

We feel strongly assured that the rule, as declared by us, is maintained by a great majority of the leading American authorities. There appears to be some obscurity and confusion in quite a class of cases, growing out of the want of distinction between what is debt or penalty and what is merely damages for a detention of the debt or penalty, some courts trusting to the general rule, without stopping to notice differences. Mr. Sedgwick seems to think that by the English cases the penalty is regarded as being the absolute limit of recovery. 2 Sedg. Dam. (6th Ed.) 262. Still there is some contrariety of view in the English cases, and Sergeant Williams struck the key of the doctrine in his note to the case of Gainsforth v. Griffith, 1 Saund. 51, note 1, saying: "But cases may occur where the obligee may recover more than the penalty of the bond, as where, by the breach of the condition, the penalty becomes a real debt due from the obligor to the obligee." * * *[14]

DEVERILL v. BURNELL.

(Court of Common Pleas, 1873. L. R. 8 C. P. 475.)

The plaintiff had shipped from London to South America certain goods to be delivered to one C. W. Bollaert there on his accepting certain drafts drawn by the plaintiff on him. The defendant was given the bills of lading and drafts for presentment to Bollaert for acceptance, agreeing to deliver the bills of lading on acceptance of the drafts, to present the latter for payment at maturity and to remit the proceeds thereof if the same were paid, and in case they should not be paid, either to return them to the plaintiff, or pay him the amount thereof. The declaration alleged a delivery of the bills of lading and an acceptance of the drafts by Bollaert, and a failure on the part of the defendant to return the drafts or pay the amount thereof.

The jury found that the bills were worthless, and a verdict was entered for the plaintiff for a farthing damages.

A rule nisi had been obtained for a new trial, or to increase the amount of the verdict to £107, the balance of the amount of the bills, after deducting certain payments on account.

[14] See, also, Slosson v. Beadle, 7 Johns. (N. Y.) 72 (1810); Stewart v. Bedell, 79 Pa. 336 (1875); Kemp v. Knickerbocker Ice Co., 69 N. Y. 45 (1871); Bell v. Truit, 9 Bush (Ky.) 257 (1873); and White Sewing Machine Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313 (1891).

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GROVE, J. The question in the present case turns upon the construction to be put upon the promise alleged in this declaration. The question is an extremely doubtful one, and unfortunately there is a division of opinion in the court. I think, with the majority of the court, that the true construction of the promise alleged is that it is not in the strictest sense an alternative promise, but a promise that the defendant would return the bills, and if he did not return them he would pay the amount of them. In that case it is clear that the defendant would be bound, if he did not return the bills, to pay the amount of them. The promise relates to a matter of business, and must receive the construction which would be given to the language used by business men in the ordinary course of business. If, in the ordinary affairs of life, I say to a man, "I will return your horse to-morrow, or pay you a day's hire of him," the only reasonable construction is that, if I do not return the horse, I will pay a day's hire. If the use of the word "or" compels us to regard this as a purely alternative promise, then the same construction would be applicable to the case I have taken as an illustration, which would be plainly unreasonable. Here the parties seem to me by their agreement to have said that they will not estimate the damage to accrue to the plaintiff by the nonreturn of the bills at the actual value of the bills, whatever it may be; but they choose to say that, if the bills are not returned, the defendant shall be bound to pay the amount of them. The plaintiff might not choose to take the risk of a change of circumstances, which might affect the value either way, but might prefer to assess the value at the amount of the bills. It seems to me that the question is, what is the meaning of this promise in ordinary parlance? and we are entitled to give it such meaning for the purposes of the present application. I therefore think the rule should be absolute.

BOVILL, C. J.[15] I unfortunately differ from the rest of the court. The question appears to me to be one of great difficulty, and my mind has fluctuated considerably during the course of the argument. * * * The question, as it seems to me, turns entirely on the construction of the language in which the contract is alleged in the declaration. If the contract as there stated is simply in the alternative to do one of two things, it would be satisfied by the performance of either, and the damages would be the loss occasioned by nonperformance of that alternative which would be least beneficial to the plaintiff. If the true construction be that of the two things to be done one depended upon the nonperformance of the other—that is, if the defendant did not return the bills, then he should pay the amount of them—the damages would be the nonpayment of that amount. The rule of law is clear that in the case of alternative contracts the person who has to perform

[15] Part of the opinion of Bovill, C. J., is omitted, and the statement of facts is rewritten.

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the contract has the right to elect which branch of the alternative he will perform. On the other hand, it is equally clear, if the contract is to do a thing, and if not to pay a sum of money, then the damages for not doing the thing are the sum of money. Under which class does this contract range itself? It must depend on the language in which it is stated. I come to the conclusion that the contract stated in this declaration is one of the class which may be called strictly alternative, and would be satisfied by the performance of either branch of the alternative, at election. The rule as to this class of contracts is laid down by Maule, J., in Cockburn v. Alexander, 6 C. B. 791, at page 814; 18 Law J. C. P. 74.

Many instances might be put; e. g., the case suggested in argument. A man might contract that immediately after a race he would deliver over his horse Ajax, or pay £1000. In that case the contract would be performed by either delivering the horse or the money, at election. There the effect of the alternative might vary according to circumstances, for, if the horse lost the race, the owner would probably desire to deliver the horse; but, if it won, he might prefer to part with the money. What would the damages be in such a case? They would, according to the rule laid down by Maule, J., be the loss occasioned by the nonperformance of the contract to the plaintiff; and, if the contract could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by nonperformance of that alternative. It may be said that the case I have put is like the present, and such a contract means that the owner is to deliver the horse, and, if not, to pay the £1000; but it seems to me that, if the terms of the contract are, as alleged in the declaration, in the alternative, by reason of the use of the disjunctive conjunction "or," we are not entitled to import into it the condition that if the one thing is not done the other shall be, which is to turn it from an alternative contract into one of another character. One test, which appears to me to be applicable, is to reverse the order in which the two alternatives are mentioned. Suppose the contract alleged were to pay £1000 or to deliver the horse. Clearly under such a contract there would be an option to do either, and it could not be said that it was a contract to pay the £1000, or, if not, to deliver the horse. So also with the present contract, if it were alleged to be to pay the amount of the bills or to deliver them up. Could it then be said that it was anything but a purely alternative contract; that it was a contract to pay the amount, and, if not, to deliver up the bills; and that damages, perhaps exceeding the amount of the bills, might be recovered for the default in returning them? Here the jury have assessed the value of the bills at one farthing, but in some cases the actual damages or nonreturn of the bills might exceed the amount of them. In whatever order the two alternatives are put, it appears to me that, the disjunctive conjunction be-

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ing used, the contract as alleged in the declaration gives an option which alternative the defendant will adopt. It seems to me that, to read the contract as suggested by my learned brethren, is to make a fresh contract for the purpose of giving effect to speculative views as to the intention of the parties, and to alter the natural signification of the language that is used. It is clear, on the face of the declaration, that the pleader treated this as an alternative contract, for the allegation of performance of conditions precedent is that all things were done necessary to entitle the plaintiff, not to payment of the amount of the bills, but to the return of the bills or the payment of the amount of them. It may have been that it was with reference to this view of the declaration that the defendant allowed judgment to go by default. Under these circumstances I think we ought to construe the declaration strictly, and are not entitled to substitute words which import a condition that one alternative shall be performed if the other is not, when, the disjunctive conjunction "or" being used, the natural meaning is a simple alternative. I have had considerable doubt on the matter, and regret to differ from my learned brethren, but I feel bound to express the opinion at which I have arrived. I am of opinion that this rule should be discharged.

Rule absolute.

PEARSON v. WILLIAMS' ADM'RS.

(Supreme Court of New York, 1840. 24 Wend. 244.)

BRONSON, J.[16] * * * The defendant, for a specified consideration, agreed that he would erect two brick houses on the lots by a certain day, or in default of doing so, would afterwards pay the intestate four thousand dollars on demand. This was an optional agreement. The defendant had the choice of erecting the houses by the day; or of omitting to do so, and then paying the specified sum of money. He made his election by omitting to build within the time. The obligation to pay the four thousand dollars, thereupon became absolute; and the plaintiffs were, I think, entitled to recover that sum, with interest from the time of the demand.

This does not belong to the class of cases in which the question of liquidated damages has usually arisen. It will be found in most, if not all, of those cases, that there was an absolute agreement to do, or not to do, a particular act, followed by a stipulation in relation to the amount of damages in case of a breach; and in declaring upon the contract, the breach has been well assigned by alleging that the party did, or omitted to do, the particular act. But here, there is no absolute engagement to build the houses. It was optional with the defendant

[16] Part of the opinion is omitted.

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whether he would build them or not; and there would have been no sufficient breach, if the plaintiffs had stopped with alleging that the houses were not built. This is not a covenant to build, with a liquidation of the damages in case of nonperformance; but it is a covenant to build within a specified time, or afterwards to pay a sum of money. The money is not to be paid by way of damages for not building the houses; but is to be paid, if the houses are not built, as part of the contract price for the lots conveyed by the intestate.

Again: This is not simply an alternative covenant, to build, or pay a sum of money, within a specified period. If it were so, the question of damages would, perhaps, be open. But it is an agreement to build by a certain day, or afterwards pay a sum of money. When the day for building had gone by, it was then merely a covenant to pay money. It was necessary, in declaring, to allege that the houses were not built—not, however, because that part of the contract was any longer in force—but by way of showing that the event had happened upon which the defendant agreed to pay the money. It had now become a simple covenant to pay money; and like other cases where there is an agreement to pay a gross sum of money, that sum, with interest from the time it became payable, forms the measure of damages.

Let us reverse the order of these stipulations, and suppose that the defendant had agreed to pay the intestate four thousand dollars by a particular day, or in default of so doing that he would afterwards build the houses. The defendant might then have discharged himself by the payment of the money by the day; or he might, at his election, suffer the day to pass, and then build the houses. If he did neither, the intestate would have an action: but the question of damages would turn wholly on the agreement to build. The enquiry would be, either how much was it worth to build, or how much has the intestate lost by the neglect. The day for paying the four thousand dollars having gone by, that clause of the covenant could have no possible influence upon the question of damages. The recovery might be either more or less than that sum. In short, the intestate would recover damages for not building, whatever those damages might appear to be. So here taking the stipulations in the order in which they stand in the contract, the question of damages turns wholly on the agreement to pay the four thousand dollars in a certain event. The event having happened, the plaintiffs are entitled to that sum, without any reference to the fact that the defendant might at one time have discharged himself by building the houses.

We have no right to call this sum of four thousand dollars a penalty, or say that it was inserted in the contract for the purpose of ensuring the erection of the houses. There is nothing in the covenant which will warrant such an inference. We are to read the covenant as the parties have made it; and then it appears that this sum of four thousand dollars was not inserted for the benefit of the intestate, but as a

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privilege to the defendant. The intestate had no option, but the defendant had. He was at liberty to discharge himself from the covenant by building the houses, if he deemed that course most for his interest or convenience; or he might elect, as he has done, to omit building and pay the money. So far as we can judge from his acts, he deems that course most beneficial to himself.

Whether the plaintiffs, or the persons whom they represent, will be better off if they got the money, than they would have been had the houses been put up, must, from the nature of the case, be a difficult question to decide; and that is the reason why the parties should be left to settle the matter for themselves, as they have done by the contract. But if we could see clearly, that the building of the houses would have been of little importance to the plaintiffs, that could not alter the case. Astley v. Weldon, 2 Bos. & P. 346; Dakin v. Williams, 17 Wend. 447. * * *[17]

SMITH v. BERGENGREN.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768.)

HOLMES, J. The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, "but not otherwise." This sum of $2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.

The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than $2,000. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. St. Albans v. Ellis, 16 East, 352; Stevinson's Case, 1 Leon. 324; Bank v. Marshall, 40 Ch. Div. 112.

If the sum had been fixed as liquidated damages, the defendant would have been bound to pay it. Cushing v. Drew, 97 Mass. 445; Lynde v. Thompson, 2 Allen, 456; Holbrook v. Tobey, 66 Me. 410, 22 Am. Rep. 581. But this case falls within the language of Lord Mansfield in Lowe v. Peers, 4 Burrows, 2225, 2229, that if there is a covenant not to plough, with a penalty, in a lease, a court of equity will

[17] See, on appeal, 26 Wend. 630 (1841).

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relieve against the penalty; "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative; no room for any relief against it; no compensation. It is the substance of the agreement." See, also, Ropes v. Upton, 125 Mass. 258, 260. The ruling excepted to did the defendant no wrong. In the opinion of a majority of the court, the exceptions must be overruled.

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PART IV.

DISCRETIONARY DAMAGES.

CHAPTER I.

IN GENERAL.

TOWNSEND v. HUGHES.

(Court of Common Pleas, 2 Leach, 150.)

The plaintiffs brought an action of scandalum magnatum for these words spoken of him by the defendant, viz., "He is an unworthy man, and acts against law and reason." Upon not guilty pleaded, the case was tried, and the jury gave the plaintiff four thousand pounds damages. * * *[1]

NORTH, Chief Justice, said: In cases of fines for criminal matters, a man is to be fined by Magna Charta with a salvo contenemento suo; and no fine is to be imposed greater than he is able to pay; but in civil actions the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges theréof. This is a civil action brought by the plaintiff for words spoken of him, which if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain; but if a particular averment of special damages make them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future, because for such the plaintiff may have a new action. He said, that as a Judge he could not tell what value to set upon the honor of the plaintiff; the jury have given four thousand pounds, and therefore he could neither lessen the sum or grant a new trial, especially since by the law the jury are judges of the damages: and it would be very inconvenient to examine upon what account they gave their verdict; they, having found the defendant guilty, did believe the witnesses, and he could not now make a doubt of their credibility.

WYNDHAM, Justice, accorded in omnibus.

ATKINS, Justice, contra. That a new trial should be granted, for it is every day's practice; and he remembered the case of Gouldston

[1] Part of the reporter's statement of the case is omitted.

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v. Wood in the King's Bench, where the plaintiff in an action on the case for words for calling of him bankrupt, recovered fifteen hundred pounds, and that court granted a new trial, because the damages were excessive. The jury in this case ought to have respect only to the damage which the plaintiff sustained, and not to do an unaccountable thing that he might have an opportunity to show himself generous; and as the court ought with one eye to look upon the verdict, so with the other they ought to take notice what is contained in the declaration, and then to consider whether the words and damages bear any proportion; if not, then the court ought to lay their hands upon the verdict: it is true, they cannot lessen the damages, but if they are too great the court may grant a new trial.

SCROGGS, Justice, accorded with NORTH and WYNDHAM, that no new trial can be granted in this cause. He said, that he was of counsel with the plaintiff before he was called to the bench, and might therefore be supposed to give judgment in favor of his former client, being prepossessed in the cause, or else (to shew himself more signally just) might without considering the matter give judgment against him; but that now he had forgot all former relation thereunto; and therefore delivered his opinion, that if he had been of the jury he should not have given such a verdict; and if he had been plaintiff he would not take advantage of it; but would overcome with forgiveness such follies and indiscretions of which the defendant had been guilty; but that he did not sit there to give advice, but to do justice to the people. He did agree that where an unequal trial was (as such must be where there is any practice with the jury), in such case it is good reason to grant a new trial; but no such thing appearing to him in this case, a new trial could not be granted. Suppose the jury had given a scandalous verdict for the plaintiff, as a penny damages, he could not have obtained a new trial in hopes to increase them, neither shall the defendant in hopes to lessen them. And therefore by the opinion of these three Justices a new trial was not granted.

COOK v. BEALE.

(Court of King's Bench, 1696. 1 Ld. Raym. 176.)

Trespass, assault and battery. The plaintiff declares, that the defendant cum manu sua ipsum Thomam Cook super sinistrum oculum percussit et violavit ita quod the said Thomas Cook, viz., the plaintiff, penitus inhabilis devenit ad scribendum vel legendum, being an officer of the excise, &c. Not guilty pleaded. Verdict for the plaintiff. And Birch, Serjeant, moved, that the court would increase the damages, upon affidavit that the plaintiff had lost his eye. But the court ordered the plaintiff to appear in court in person, for otherwise they said, that they could not increase the damages; upon which the plaintiff was

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brought into court. And afterwards the court after several motions resolved:

1. That if the word mayhemiavit is not in the declaration, yet if the declaration be particular, so that it appears by the description, that the wound was a maim, it is sufficient, and the court may increase damages. Rast Appeal, 46, 8 Hen. IV, 21b.

2. Resolved, That the court may increase the damages if the wound be apparent, though it be not a maim. And so it was done in the case of the Lord Foliot. Therefore in this case, because the wound is visible, though it be no maim (for it is not a maim because the eye is not wholly out, but the plaintiff only declares, quod inhabilis ad legendum vel scribendum devenit by the wound) yet damages may be increased. And Powell, Justice, said, that Holt, Chief Justice was of that opinion. So (per Powell, Justice) though the loss of a nose is not a maim, to bring an action felonice for the loss of it, yet the court may in such case increase the damages. And he said, that the court might increase the damages upon a writ of inquiry, because that was but a bare inquest of office. Jervis v. Lucas, Style, 345; Mallet v. Ferrers, 1 Leon. 139; Dames v. Rock, Bendl. 158; Le Vicar de Halifax, Littlet. Rep. 51; Hutt. 53, 121; Burford v. Dodwell, 1 Sid. 433; Dodwell v. Burford, 1 Mod. 24, were cited, and a case between Swalley and Babington, where in a general action of assault, battery, and wounding, upon view the damages were increased about four years ago, upon the motion of Serjeant Lovell.

3. Resolved, That the justices of nisi prius could not increase the damages; but if evidence be given of a great wound, they may indorse it upon the postea, and upon that certificate the court here will increase the damages. 8 Hen. IV, 23, Latch, 223, Hooper v. Pope, where there was neither mayhemiavit in the declaration, nor the wound described specially; yet it being indorsed upon the postea, that evidence was given of a wound, the damages were increased upon the view. 39 Edw. III, 20b; 22 Edw. III, 11; Davis v. Foliot, Style, 310; Austin v. Hilliers, Hardr. 408. But per Powell, Justice, if the cause be tried before a judge of the same court, where the motion is made to increase the damages, there is no need to have any indorsement upon the postea. (Note. This cause was tried before himself.) The damages in the principal case were increased to £40.

BEARDMORE v. CARRINGTON.

(Court of Common Pleas, 1764. 2 Wils. 244.)

An action of trespass and false imprisonment, in that the defendants, acting under an illegally issued warrant, broke open plaintiff's dwelling, opened drawers and desks, read secret and private letters, carried away private documents, and subsequently imprisoned plain-

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tiff for six and a half days. The jury found a verdict for plaintiff for one thousand pounds.*

CURIA. We are called upon, on our oaths to say, whether these are excessive damages or not, and ought to have very clear evidence before us, before we can say they are excessive. The jury were directed to assess damages for the plaintiff according to the evidence given, under an idea, that the defendants could not by law justify the trespass under this warrant by any manner of plea whatsoever. It is clear that the practice of granting new trials is modern, and that courts anciently never exercised this power, but in some particular cases they corrected the damages from evidence laid before them. There is great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal; there is also a difference between a principal verdict of a jury, and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed themselves without any inquest at all; only in the case of maihem, courts have in all ages interposed in that single instance only; as to the case of the writ of inquiry in the year-book of H. 4. we doubt whether what is said by the court in that case be right, That they would abridge the damages unless plaintiff would release part thereof, because there is not one case to be found in the year-books wherever the court abridged the damages after a principal verdict, and this is clear down to the time of Palmer's Rep. 314, much less have they interposed in increasing damages, except in the case of maihem; one side says no attaint lies (in cases of tort) for excessive damages; the other side says it does; we give no opinion as to that point; but it is said in 100 cases in the books that an attaint does lie. See 10 Rep. 119, Lord Cheney's Case.

All, or most of the cases of new trials, are where juries have misdemeaned themselves contrary to their oath; in the case of Wood v. Gunston, in Stiles, 466 (1655), the misconduct of the jury was certainly an ingredient, and so it appears from the case of Roe v. Hawkes, in 1 Lev. 97. Some books say it was a trial at bar, and it is highly probable there was some evidence that the jury had been tampered with; and this was certainly the very first case of a new trial, and from that period the courts have exercised the power of granting new trials in several cases; as when the jury find contrary to the judges' directions in point of law, when they find directly contrary to the evidence, (that is to say) against evidence all on one side, for if there be evidence on both sides, the court never interposes in that case; as to granting the first new trial in Stiles, 466, there is great reason

*The statement of facts is rewritten.

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(as was said before) to think it was for misbehaviour in the jury; it was an action for words; so was the Case of Lord Townsend, 2 Mod. 250, for words, and £4000. damages, where the court refused to grant a new trial; and if a court could not say that those damages were excessive, they can hardly say that damages are excessive in any case of slander whatever; and this case has never been contradicted or denied to be law; the Case of Ash and Ash, Comb. 357, was plainly for the misdemeanor of the jury in refusing to answer the judge when he asked what ground or reason they went upon; to be sure judges are to advise, but not to controul juries; and my Lord Holt and the King's Bench did right, in granting a new trial in that case. In the case of Wilmot v. Berkley, Trin. 31 & 32 Geo. II, B. R., which was an action for criminal conversation, the jury gave £500. damages against the defendant, and upon affidavits that he was only a clerk in low circumstances, and unable to pay so large a sum, it was moved for a new trial, but the court refused to grant even a rule to shew cause, because in cases of tort the jury are the only proper judges of the damages: We are now come to the case in 1 Stra. 691, Chambers v. Robinson, which seems to be the only case wherever a new trial was granted merely for the excessiveness of damages only; we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the court could pronounce the damages to be excessive; the principle on which it was granted, mentioned in Strange, was to give the defendant a chance of another jury; this is a very bad reason, for if it was not, it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots, and therefore we are free to say this case is not law; and that there is not one single case, (that is law), in all the books to be found, where the court has granted a new trial for excessive damages in actions for torts.

It was strongly argued at the trial of this cause, that the jury were to measure the damages by what the defendant had suffered by this trespass and six days and a half imprisonment; but this was thought a gross absurdity by the judge who presided there.

We desired to be understood that this court does not say, or lay down any rule that there can never happen a case of such excessive damages in tort where the court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush.

The nature of the trespass in the present case is joint and several; and the plaintiff has still another action against Lord Halifax, who it is said is more culpable than the defendants, who are only servants, and have done what he commanded them to do, and therefore the damages are excessive as to them; but we think this is no topic of mitigation, and for any thing we know the jury might say, "we will make no difference between the minister who executed, and the magistrate who granted this illegal warrant;" so the court must consider

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these damages as given against Lord Halifax, and can we say that £1000. are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and prys into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days; it is an unlawful power assumed by a great minister of state; can any body say that a guinea per diem is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects; we cannot say the damages of £1000. are enormous, and therefore the rule to shew cause why a new trial should not be granted must be discharged. Per totam curiam.

RUSSELL v. PALMER.

(Court of Common Pleas, 1767. 2 Wils. 325.)

Special action on the case against an attorney for negligence in failing to issue execution upon a judgment until the debtor and his bail were discharged.

CURIA. This cause was first tried before Lord Camden about half a year ago, when a verdict was given for the plaintiff for £3000. the whole debt, by my Lord's direction; but afterwards a new trial was granted, my Lord and the court being of opinion that he had misdirected the jury in telling them they ought to find a verdict for the whole debt, whereas this action sounds merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit; and upon the last trial the jury were told they might find what damages they pleased, and accordingly found only £500. as it appeared to them in evidence, that Stewart was not totally insolvent. We are all of opinion that this action is well conceived, and lies against Mr. Palmer for negligence, and we have authority to say that Lord Camden is of the same opinion. Judgment for the plaintiff.

GILBERT v. BERKINSHAW.

(Court of King's Bench, 1774. Loft. 771.)

Lord MANSFIELD. This rule to shew cause why there should not be a new trial, comes before the court singly on the judge's report.

Not on the ground of surprise, material evidence since discovered, or mistake in the jury.

Verdict taken upon two counts, one of which is, for saying of the plaintiff, "He is a scoundrel, and I will prove it;" the other count also charges words of defamation.

The only ground is of excessive damages: And though I would be very sorry to lay down a rule that no new trial would ever be grant-

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ed on account of excessive damages, where they might be so enormous that it would appear their minds must have been unjustly and unreasonably heated, or otherwise under a corrupt influence, or have taken in something by mistake to the damages which by law they could not; yet I do not think it fit that this court shall say, in a matter of uncertain damages, there shall be a new trial, because if the court had been to fix the damages they might have given less, or a jury might have given less.

The court will not judge by a measuring cast, where matters, properly for all parties, have been left to the sound discretion of a jury, in a subject of which they are competent and proper judges.

It is enough that it may be supported upon the general circumstances (and there are no special damages assigned), the nature of the injury, the feeling which the plaintiff may have of it, the degree of evidence of malice, are all circumstances properly left to a jury.

I remember, since I sat there, an action by a very poor man, for a charge of criminal conversation with the plaintiff's wife. On a motion for a new trial, on account of excessive damages, new trial was refused. And so in the case of a very poor servant of Sir ———'s, who had received from his master 150 lashes, and there was evidence that he had said that for a very trifling sum he would receive them again. The jury found the plaintiff £100. damages. They resented the behaviour of his master; they exercised their judgment accordingly; and the court would not grant a new trial.

This is not the case of the greyhound, of the value of which the court could form an estimate, and say they have found forty times too much. And it was upon evidence, and the judge not dissatisfied.[2]

PRICE v. SEVERN.

(Court of Common Pleas, 1831. 7 Bing. 316.)

This action was brought to recover compensation in damages for an assault and false imprisonment; the defendant pleaded not guilty; and the cause was tried before Gaselee, J., at the last Northampton assizes. It appeared that the plaintiff, a man in low circumstances, claimed relationship with the wife of the defendant, who had been recently high sheriff for the county of Northampton. The plaintiff went down from London to Northamptonshire, and applied at the defendant's house for pecuniary assistance. Becoming unreasonable in his demands, he was warned off the premises. He still, however, continued his importunities, and having refused to quit the premises, the defendant directed a constable to take him into custody. This order the constable obeyed, and the plaintiff was taken to an inn for the night. On the following morning he was again brought to the defendant, and after some little

[2] Only the opinion of Lord Mansfield is published herein.

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conversation, said he must have some money. The defendant said he would ask Mrs. Severn about that—went away, and returned in a few minutes with two sovereigns, which he told the plaintiff he might take or go before a justice: the plaintiff consented to take the money, but said, at the same time, that he must have something for the keep of his horse. The defendant then gave him half a crown, and directed the butler to furnish some refreshment. The butler did so, in the housekeeper's room, and the plaintiff went away. When he was first taken into custody the constable put handcuffs on him, but immediately afterwards removed them; and there was no evidence to show that they had been put on by the defendant's order. Gaselee, J., in summing up the evidence, told the jury, that as the defendant had not pleaded accord and satisfaction, the evidence as to the money given to the plaintiff, and accepted by him, must be taken as going only in reduction of damages, and the verdict must be for plaintiff; but it would be for the jury to say how much more he was entitled to upon the evidence they had heard. The jury returned a verdict for £100. The learned judge, on reading the report, stated, that a verdict for a shilling would have met the justice of the case.

TINDAL, C. J. I think this case ought to be submitted to another jury. I offer no comment on the cases which have been cited, and would detract nothing from their authority. I am as little disposed as any man to interfere with the province of a jury, and I should not be induced to send a case down again for excessive damages except where those damages are enormous and disproportionate. I consider them such in this case on account of the limit which the plaintiff himself put on his demand in the first instance. On the morning after the detention, he seems to have thought himself well off with the two sovereigns and half crown which the defendant gave him; and there is nothing like duress in the case; for after he had received the sovereigns he stipulated for a further sum to defray the expense of his horse, and having received it, went to the defendant's housekeeper's room, where he was supplied with refreshment. It seems to me, that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for £100., as we cannot but see on the evidence of the plaintiff himself, is far beyond what he merits. The case, therefore, must go before another jury.

PARK, J. I am surprised that it should have been supposed the court has any wish to interfere with the due province of the jury. I agree with all the cases which have been cited, and the principle laid down by Mr. Justice Yates in Bruce v. Rawlins, 3 Wils. 61, that "the case must be very gross, and the damages enormous, for the courts to interpose." In Duberley v. Gunning, 4 T. R. 651, the jury thought that the plaintiff had not connived at the dishonour of his wife, and therefore increased the damages on account of the foul and slanderous defence. The court is attempting nothing in this case which is not usual, and the only question is, whether these damages are excessive and enormous?

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I am clearly of opinion they are, on the plaintiff's own showing, and we are not doing away with juries by ordering a new trial, but only sending the case to another jury. There can be no question that the degree of insult may vary according to the station in life of the party. That was held in the case of striking off the hat; an act, which in one station might be no more than a frolic, in another, an insult calling for damages.[4]

WESTON, J., IN MILLER v. TRUSTEES OF MARINER'S CHURCH.

(Supreme Judicial Court of Maine, 1830. 7 Me. 51, 20 Am. Dec. 341.)

By the common law, the estimation of damages is within the province of the jury. Courts may, and often do, in cases of manifest excess, interfere by granting a new trial. Where the injury affects the personal feelings, this is rarely done. And in cases of fraud or wanton trespass, considerable latitude has been allowed. But where there exists a fixed standard or scale, by which damages may be calculated, a jury will not be permitted to depart from it. Thus assumpsit, instead of debt, is now the remedy universally resorted to, upon simple contracts for the payment of money. By the form of the action, damages are sought for the nonperformance; but the measure of damages is the debt due with interest for the detention, for a longer or shorter period, according to circumstances. In other cases, arising from the nonperformance of agreements, the standard is less definite, and necessarily attended with greater uncertainty. In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the nonperformance, are not allowed.

[4] The concurring opinion of Alderson, J., is omitted. Bosanquet, J., also concurred.

In Lockley v. Pye, 8 Mees. & W. 133 (1841), Alderson, B., said: "It was entirely a question for the jury what damages they would allow. Juries have not much compassion for trespassers, and I do not think they are bound to weigh in golden scales how much injury a party has sustained by a trespass."

See, also, Sharp v. Brice, 2 W. Bl. 942 (1774); Hawkins v. Sclet, Palm. 314; Ash v. Lady Ash, Comb. 357; Delves v. Wyer, 1 Brown. & G. 204; Barker v. Dixie, 2 Str. 1051 (1736); Williams v. Currie, 1 Man. G. & S. 841 (1845); Duberley v. Gunning, 4 Term R. 651 (1792); Elliot v. Allen, 1 Man. G. & S. 18 (1845); Redshaw v. Brooks, 2 Wils. 405 (1769).

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HAMLIN v. GREAT NORTHERN RY. CO.

(Court of Exchequer, 1856. 1 Hurl. & N. 408.)

The plaintiff was a master tailor going to Yorkshire to see his customers, having previously made arrangements to meet them at particular times and places. On the 25th of October, 1855, he took a ticket for Hull by the two o'clock train from King's Cross, which was advertised to arrive at Hull at half-past nine o'clock. On reaching Great Grimsby he found that there was no train to take him on to Hull. It appeared that the ferry-boats from New Holland to Hull only run in connexion with the trains. The plaintiff stated that there was no possibility of his getting to Hull that night, and that he therefore remained at Great Grimsby, and paid 2*s.* for his bed and some refreshment. In the morning he presented his ticket for Hull, but the company refused to recognize it, and he paid 1*s.* 4*d.* as the fare from Great Grimsby to Hull. He arrived at Hull at half-past eight o'clock on Friday, the 26th, and being too late for the seven o'clock train from Hull to Driffield, was unable to keep his appointments at Driffield and other places, which were generally on the market days. He stated that he incurred considerable expense, and lost much time, in going to the houses of his customers, having been eight days longer on his journey than he would have been if he had been able to have kept his appointments.

The learned judge directed the jury that the defendants had broken the contract, and that the plaintiff was entitled to recover for the direct consequences of that breach of contract; that he would have been entitled to charge the company with the expenses of getting to Hull, but that he had no right to cast upon the company the remote consequences of remaining the night at Grimsby; that, not having communicated to the company his intention of proceeding from Hull to Driffield, he could not recover damages for having been prevented from doing so; that he was entitled to the fare paid from Great Grimsby, and perhaps, the 2*s.* for his bed and refreshment. He ruled that the damages ought not to exceed 5*s.* Verdict for the plaintiff, with 5*s.* damages.[5]

POLLOCK, C. B. We are all of opinion that the rule must be refused. The action is brought to recover damages for a breach of contract. A contract to marry has always been considered an exceptional case, in which the injury to the feelings of the party may be taken into consideration. So in the case of wrongs not founded on contract, the damages are entirely a question for the jury, who may consider the injury to the feelings, and many other matters which have no place in questions of contract. In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated. Mr. Wilde was invited at the trial to state what were the damages to which the plaintiff was entitled. He said, general damages. The

[5] Part of the statement of facts is omitted.

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plaintiff is entitled to nominal damages, at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.

RANSOM v. NEW YORK & E. R. CO.

(Court of Appeals of New York, 1857. 15 N. Y. 415.)

Action for personal injuries. Plaintiff was allowed to recover for necessary expenses for nursing and medical aid, for pain and suffering, present and prospective, and for deprivation for the use of his limbs as a result of the injury. A verdict for $14,000 was returned.

BOWEN, J.[6] In actions of tort, or for injuries either to the person or property, damages are awarded as a compensation or satisfaction for the injury sustained; and in most of these actions the compensation or satisfaction is given in money, for the reason that the law has provided no other means of redress. In some cases a full and complete compensation and satisfaction is thus obtained, as in an action for the conversion of a chattel bearing a market value; the value of the chattel with the value of its use until satisfaction is obtained, and the costs and expenses of the litigation, will afford a perfect indemnity to the party deprived of his property. So, too, in an action for an injury to such a chattel, pecuniary damages will afford full compensation to the owner and the amount which he ought to receive can be ascertained with a good degree of certainty.

But in most if not all actions for injuries to the person or to character, pecuniary damages will not afford a complete, or at least a specific compensation, for the reason that, by the use of money, the party injured cannot be restored to the condition, situation or standing he was in prior to the commission of the wrongful act producing the injury. It is true that where a party, by an injury to his person, is so disabled as to be incapable of pursuing his ordinary avocations, and to require medical attendance and nursing, pecuniary damages may compensate him for his loss of time and for the expenses incurred; but it cannot be contended for a moment that indemnity for the loss of time and expenses incurred will constitute a satisfaction for the whole in-

[6] The opinion of Denio, C. J., and part of the opinion of Bowen, J., are omitted, and the statement of facts is rewritten.

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jury, nor can any authority be found holding that the law will furnish no redress beyond such indemnity. Bodily pain and suffering, more or less acute and intense, and more or less protracted, invariably result from and are directly and immediately caused by an injury to the person, and in many cases they are by far the least desirable consequences of the injury; and if the law affords no redress therefor, it falls short of giving compensation for injuries to a greater extent that I had supposed. That pain or suffering is a real and substantive injury cannot be disputed. It is true, as claimed by the defendant's counsel, that it is impossible to communicate its extent or intensity to a court or jury to any degree of certainty or accuracy; and if that could be definitely and precisely ascertained, the compensation or satisfaction therefor cannot, in the very nature of things, be measured by dollars and cents. But the same difficulty in measuring the damages occurs in many other cases. In an action for carelessly destroying an ornamental tree, the growth of years, and standing contiguous to a dwelling, compensation to the owner cannot be measured by pecuniary damages, as the tree cannot be said to have any pecuniary value; and yet, pecuniary damages are awarded to him as a compensation for the injury. So, too, in an action for creating or continuing a nuisance contiguous to the plaintiff's dwelling, but not on his premises, where the only damages resulting are odors disagreeable and offensive, but not injurious to health, pecuniary damages will be awarded, although it cannot for a moment be contended that dollars and cents constitute any measure of the damages.

The same is the case in actions for libel, verbal slander, seduction and crim. con.

In actions of the above description, where the wrongful act producing the injury is prompted by malice, it has been often held that the jury may, in awarding damages, go beyond a compensation for the injury resulting, by adding thereto an amount as a punishment to the offender and an example to others; but the amount which should thus be added must always be equally as arbitrary and as incapable of being measured by dollars and cents as the amount to be given to the injured party for the pain and suffering endured by him, resulting directly from the wrongful act; and the same rule by which it is sought to exclude the one would also exclude the other.

In all actions of this description, the amount of damages to be awarded as a compensation must always be submitted to the good sense of the jury, under proper instructions depending upon the circumstances of each particular case.

The argument of the defendant's counsel would result in this, that no damages, as compensation or satisfaction, can be awarded, except for the pecuniary loss resulting from a wrongful act, that is, for such loss as money or the use of money can restore, or such loss as can be computed or measured by dollars and cents. If such be the rule, our law affords but a very inadequate remedy for injuries sustained; and,

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if I am not very much mistaken, the practice of the courts, both of this country and England, has been in direct opposition to the rule. * * *

Judgment affirmed.

BALTIMORE & O. R. CO. v. CARR.

(Court of Appeals of Maryland, 1889. 71 Md. 135, 17 Atl. 1052.)

ALVEY, C. J.[1] This is an action on the case, brought by the appellee against the appellant for the wrongful refusal of admission of the former to the cars of the latter. * * *

We think there was error in the second instruction of the court, in respect to the question of damages. The jury were instructed that, if they found for the plaintiff for the refusal to pass him through the gate, then he was entitled to such damages as they might find would, under all the circumstances, compensate him for such refusal. This left the whole question of damages at large, without definition by the court, to the discretion of the jury, and without any criterion to guide them. What compensation would embrace—whether actual and necessary expenses incurred by reason of the refusal, or the mere delay, or disappointment in pleasure, or the possible loss in business transactions, however remote or indirect, or for wounded feelings—were matters thrown open to the jury, and they were allowed to speculate upon them without restraint. This is not justified by any well-established rules of law. In the case of Knight v. Egerton, 7 Exch. 407, where, in effect, such an instruction was given, the court of exchequer held it to be wholly insufficient, "and that it was the duty of the judge to inform the jury what was the true measure of damages on the issue, whether the point was taken or not;" and the court directed a new trial because of the indefinite instruction as to the true measure of damages. The rule by which damages are to be estimated is, as a general principle, a question of law to be decided by the court; that is to say, the court must decide and instruct the jury in respect to what elements, and within what limits, damages may be estimated in the particular action. Harker v. Dement, 9 Gill, 7, 52 Am. Dec. 670; Hadley v. Baxendale, 9 Exch. 341, 354. The simple question whether damages have been sustained by the breach of duty or the violation of right, and the extent of damages sustained as the direct consequences of such breach of duty or violation of right, are matters within the province of the jury. But beyond this, juries, as a general rule, are not allowed to intrude, as by such intrusion all certainty and fixedness of legal rule would be overthrown and destroyed. In a case like the present the rule for measuring the damages is fixed and determinate, and should be applied to all cases alike, except in those cases where there

[1] Part of the opinion is omitted.

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may be malice or circumstances of aggravation in the wrong complained of, for which the damages may be enhanced. Indeed, it is of the utmost importance that juries should be explicitly instructed as to the rules by which they are to be governed in estimating damages; for, as it was justly observed by the court in Hadley v. Baxendale, supra, "if the jury are left without definite rule to guide them, it will, in most cases, manifestly lead to the greatest injustice." In cases of this character the jury can only give such damages as were the immediate consequences naturally resulting from the act complained of, with the right to allow exemplary damages for any malice, or the use of unnecessary force, in the commission of the wrong alleged. Railroad Co. v. Blocher, supra. The expenses incurred by the plaintiff, occasioned by the refusal of the defendant to admit him to the train, such as the expense of a ticket to travel upon another train, and hotel expenses incurred by reason of the delay, may be allowed for; and mere inconvenience may be ground for damage, if it is such as is capable of being stated in a tangible form, and assessed at a money value; and so for any actual loss sustained in matters of business that can be shown to have been occasioned as the direct and necessary consequence of the wrongful act of the defendant made the ground of action. * * *

WELCH v. WARE.

(Supreme Court of Michigan, 1875. 32 Mich. 77.)

CAMPBELL, J.[8] * * * The jury found in this case, by giving any verdict at all for Ware, that he had been assaulted willfully and without justification. He was therefore entitled beyond controversy to all of his actual damages. He was evidently allowed here an amount exceeding his pecuniary losses. But it is claimed that a plaintiff can recover no more than his actual damages, and that these cannot be increased or aggravated by the vindictive feelings or the degree of malice of the assailant, from which it is claimed no additional harm can come to the party injured. And it is urged that vindictive or exemplary damages are improper.

The common sense of mankind has never failed to see that the injury done by a willful wrong to person or reputation, and in some cases to property, cannot be measured by the consequent loss in money. A person assaulted may not be disabled or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money, directly or consequently. He may incur no pecuniary damage whatever. And it is very clear that the shame and mental anxiety and suffering or indignation consequent on such a wrong are not capable of a money measurement. No one would avow in advance that he would be willing for a given sum

[8] Part of the opinion is omitted.

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to meet that experience; and no one who should seek it as a means of putting money into his pocket would be likely to receive compensation at the hands of a jury.

So a person who is struck down by a blow from the arms of a windmill may be much more seriously hurt than by a blow from a fist or whip. But no one would dream of comparing these injuries by their physical effects.

When the law gives an action for willful wrongs, it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental, and not physical. And it assumes further that this is actual, and not metaphysical damage, and deserves compensation. When this is once recognized, it is just as clear that the willfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.

If actual damage is not confined to pecuniary consequences, and cannot be measured by a money standard, all redress in damages must partake of a punitory character to some extent, and the line between actual and what are called exemplary damages cannot be drawn with much nicety. In every such case the jury are compelled to determine from their own sense of justice, and their knowledge of human nature, what the amount of damages should be. When the amount to be recovered must in all cases rest in their fair and deliberate discretion, the law can give them no precise instructions. It aims to do justice by directing them to distinguish between provoked grievances and those which are unprovoked, or for which the provocation is in great disproportion to the wrong, making adequate compensation in all cases, but giving heavier damages in all cases where the wrong is aggravated by bad motives or malice. It would be of very little use to present the law to a jury upon any theoretical basis. The rule is intelligible and has not been found to work badly in practice. But whether this rule involves merely compensation, or whether it is based on a theory of punishment, is not very important in practice, and does not come within the domain of law, so long as the jury are obliged to estimate by their own good judgment. * * *

In cases like this, where all the surroundings are before the jury, and where the damages are so largely discretionary, it would be utterly impossible to fix any very precise rules to guide the jury. Beyond such cautions as may guard them from allowing scope to prejudice and passion, any specific rules would hardly be rules of law, in most cases, and experience has shown they have so little effect on juries that it is questionable whether they understand them. There are no cases in which more respect is paid to the general sense of jurors, as representing what may be regarded as the common sense of ordinary

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men on similar facts,—and the law has been allowed to rest on this discretion as quite as likely to do justice as any other standard. It is sometimes abused, but its average working is not unjust. Arbitrary rules could hardly fail to be mischievous. * * *[9]

RETAN v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan, 1892. 94 Mich. 146, 53 N. W. 1094.)

The plaintiff was a young boy and was run over by a train of the defendant company. His left foot was cut off above the ankle and his right foot was crushed. Both were subsequently amputated. The jury returned a verdict for $30,000.

LONG, J.[10] * * * It is claimed that the amount of damages is excessive. Not having found any error in the proceedings, or anything improper upon the trial tending to prejudice the defendant's rights or inflame the jury, and thereby prejudice them against the defendant, we cannot disturb the verdict on the ground solely that it is greater in amount than we think should have been given. Hunn v. Railroad Co., 78 Mich. 529, 44 N. W. 502, 7 L. R. A. 500; Richmond v. Railway Co., 87 Mich. 392, 49 N. W. 621; Stuyvesant v. Wilcox, 92 Mich. 233, 52 N. W. 467, 31 Am. St. Rep. 580. I am not prepared to say, however, that cases might not arise where, even under our former rulings, we would not be justified in considering that question. If the verdict was such as to shock the common sense and judgment of mankind, it might call for a different rule, and the court might be justified in overturning it. But that is not so in this case. The jury have taken into consideration the pain and suffering this plaintiff has endured, and the loss to him for the remainder of his years of both feet. It may be large, but the jury alone had the right to determine it. The judgment must be affirmed, with costs. The other justices concurred.

[9] See C., K. & W. R. R. Co. v. Drake, 46 Kan. 568, 26 Pac. 1039 (1891), for a full discussion of the province of the jury in determining value.

Kinne, J., in Limburg v. German Fire Ins. Co. of Peoria, 90 Iowa, 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. Rep. 468 (1894), said: "The jury were told by the court in an instruction that if they found that the building was not totally destroyed, and it could be repaired at an expense of $200 to $250, then plaintiff's damages would be limited to the amount it would have cost to repair said building, and put the same in as good condition as before the fire occurred, with 6 per cent. interest per annum thereon. Under the provisions of the policy this instruction was proper, and, whether it was so or not, the jury were bound to follow it. The undisputed evidence was that for $250 the building could have been made as good as it was before the fire. The jury disregarded the court's instruction, and found for plaintiff for the full amount of the policy, with interest. The court should have set the verdict aside for the reasons given."

[10] Part of the opinion is omitted, and the statement of facts is rewritten.

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PETERSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Minnesota, 1896. 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.)

START, C. J.[11] This is an action for libel, in which the plaintiff recovered a verdict for $5,200, and the defendant appealed from an order denying its motion for a new trial. The defendant on January 19, 1893, received at its office in New Ulm, from Albert Blanchard, a message for transmission over its telegraph line to St. Paul, which reads thus: "New Ulm, Minn., 1–19, 1893. To S. D. Peterson, Care Windsor, St. Paul, Minn.: Slippery Sam, your name is pants. [Signed] Many Republicans." The New Ulm operator sent the message over the wires to St. Paul, where it was taken from the wire by the operator, and delivered to the plaintiff in a sealed envelope bearing his address as stated in the message. * * *

The damages in this case are so excessive as to conclusively show that the verdict was the result of passion and prejudice. Courts should interfere with an assessment of damages by a jury with great caution, and sustain the verdict unless it appears that it was the result of passion or prejudice. But the verdict in this case admits of no defense. As correctly stated by the trial court in its instructions to the jury, the sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were limited to such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal and exposing himself to serious punishment, and that there is no evidence to justify the inference that the contents of the message ever reached the public, except through the plaintiff, a verdict assessing his damages at $5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice.

Reversed.[12]

[11] Part of the opinion is omitted.

[12] See the same case again in 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. Rep. 461 (1898).

See, similarly, Praed v. Graham, 24 Q. B. Div. 53 (1889); Shaw v. B. & W. R. R., 8 Gray (Mass.) 45 (1857); Taylor v. Shelkett, 66 Ind. 297 (1879). While it is usual to order a new trial when a verdict is set aside as excessive, in most jurisdictions the practice prevails of giving the plaintiff the option between submitting to a reduction in the verdict to what the court deems reasonable and a new trial. This is termed a "remittitur." See, for criticisms of this practice, Goodno v. Oshkosh, 28 Wis. 300 (1871), and Loewenthal v. Streng, 90 Ill. 74 (1878). A remittitur is also proper when a verdict is returned for a larger sum than that laid in the declaration. David v. Conard, 1 G. Greene (Iowa) 336 (1848).

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TATHWELL v. CITY OF CEDAR RAPIDS.

(Supreme Court of Iowa, 1903. 122 Iowa, 50, 97 N. W. 96.)

Action to recover damages resulting from personal injuries received by plaintiff while driving in a street of defendant city by reason of his horse stepping into a hole in the highway in or beside a culvert, the result being that plaintiff was thrown to the ground. Judgment for plaintiff on a former trial was reversed, and a new trial ordered. 114 Iowa, 180, 86 N. W. 291. On this trial verdict was returned for the plaintiff for $100 damages, which on plaintiff's motion, was set aside as inadequate. From this ruling defendant appeals. Affirmed.

McCLAIN, J.[18] There was a conflict in the evidence as to whether the street was defective at the place where plaintiff was injured, but the verdict of the jury for the plaintiff establishes the existence of a defect and the negligence of the city with reference thereto, and we have for consideration only this question: Did the trial judge err in setting aside the verdict on the ground that the damages awarded to plaintiff for the injury were inadequate? The right of jury trial, as uniformly recognized under the common-law system, involves the determination by the jury, rather than by the judge, of questions of fact, including the amount of damage to be given where compensation is for an unliquidated demand. Nevertheless, the trial courts have exercised from early times in the history of the common law the power to supervise the action of the jury, even as to the measure of damages, and to award a new trial where the verdict is not supported by the evidence and is manifestly unjust and perverse. And while it is uniformly held that the trial judge will interfere with the verdict of the jury as to matters of fact with reluctance, and only where, on the very face of the evidence, allowing every presumption in favor of the correctness of the jury's action, it is apparent to a reasonable mind that the verdict is clearly contrary to the evidence, yet the power of the judge to interfere in extreme cases is unquestionable. It has sometimes been said that the judge should not interfere where the verdict is supported by a scintilla of evidence; but the scintilla doctrine has been discarded in this state, and is not now generally recognized elsewhere. Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235. The general scope and extent of the judge's supervisory power with reference to the jury's verdict as to questions of fact is well illustrated by the very first reported case in which the power appears to have been exercised —that of Wood v. Gunston, decided in 1655 by the Court of King's Bench (or, as it was called during the commonwealth, Upper Bench), found in Style's Reports, on page 466. The action was upon the case for speaking scandalous words against the plaintiff, charging him, among other things, with being a traitor. The jury gave plaintiff

[18] Part of the opinion is omitted.

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£1,500 damages, whereupon the defendant moved for a new trial on the ground that the damages were excessive, and that the jury had favored the plaintiff. In opposition to this it was said in argument that, after a verdict the partiality of the jury ought not to be questioned, nor was there any precedent for it "in our books of the law," and that it would be of dangerous consequence if it should be permitted, and the greatness of the damages cannot be a cause for a new trial. But counsel for the other party said that the verdict was a "packed business," else there could not have been so great damages, and that the court had power "in extraordinary cases such as this is to grant a new trial." The chief justice thereupon said: "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary, discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them. And it is for the people's benefit that it should be so, for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended with the court; wherefore let there be a new trial the next term, and the defendant shall pay full costs, and judgment to be upon this verdict to stand for security to pay what shall be recovered upon the next verdict." This case is especially interesting in connection with the present discussion, because it is one in which the assessment of damages was peculiarly within the province of the jury, and because the nature of the supervisory power of the trial judge is explained as being, in effect, to set aside a verdict for excessive damages in such cases which seem to have been the result of passion and prejudice, and not the deliberate exercise of judgment. That the practice of granting new trials under such circumstances has continued in all the courts administering the common law from the time of the case just cited to the present time is a matter of common knowledge with the profession, and citation of authorities would be superfluous. That the power is exercised to prevent miscarriage of justice by reason of the rendition of a verdict by the jury which is wholly unreasonable, in view of the testimony which is given in the presence of the court, is universally conceded.

But the question with which we are now more particularly concerned is whether this power of the trial judge may be exercised where the injustice consists in rendering a verdict for too small an amount. If the case is one in which the measure of damages is a question of law, the court has, of course, the same power to set aside a verdict for too small an amount as one which is excessive; and this is, in general, true without question where the damages are capable of exact computation—that is, where the facts established by the verdict of the jury show as matter of law how much the recovery should be. In such cases the court may grant a new trial, unless the defendant will consent to a verdict for a larger amount, fixed by the court, than that found by the jury; just as in case of excessive damages under

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similar circumstances the court may reduce the amount for which the verdict shall be allowed to stand, on penalty of setting it aside if the successful party does not agree to the reduction. Carr v. Miner, 42 Ill. 179; James v. Morey, 44 Ill. 352. It seems to have been thought by some courts that the general supervisory power over verdicts, where the amount of damage is not capable of computation, and rests in the sound discretion of the jury, should not be exercised where the verdict is for too small an amount; at least not with the same freedom as in cases where it is excessive. Barker v. Dixie, 2 Strange, 1051; Pritchard v. Hewitt, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; Martin v. Atkinson, 7 Ga. 228, 50 Am. Dec. 403. No such limitation on the supervisory power of the trial judge has been definitely established, and by the great weight of authority, both in England and America, the power to set aside the verdict, when manifestly inconsistent with the evidence, and the result of a misconception by the jury of their powers and duties, is as fully recognized where the verdict is inadequate as where it is excessive; and ample illustration of the exercise of this power is found in actions to recover damages for personal injuries or injury to the reputation, although in such cases the amount of damage is peculiarly within the jury's discretion. Phillips v. London & S. W. R. Co., 5 Q. B. D. 781; Robinson v. Town of Waupaca, 77 Wis. 544, 66 N. W. 809; Whitney v. Milwaukee, 65 Wis. 409, 27 N. W. 39; Caldwell v. Vicksburg, S. & P. R. Co., 41 La. Ann. 624, 6 South. 217; Benton v. Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; McNeil v. Lyons, 20 R. I. 672, 40 Atl. 831; Lee v. Publishers, George Knapp & Co., 137 Mo. 385, 38 S. W. 1107; McDonald v. Walter, 40 N. Y. 551; Carter v. Wells, Fargo & Co. (C. C.) 64 Fed. 1007. * * *

PHILLIPS v. LONDON & S. W. R. CO.

(Court of Appeal, 1879. L. R. 4 Q. B. Div. 406.)

COCKBURN, C. J.[14] This was an action brought by the plaintiff to recover damages for injuries suffered, when traveling on the defendants' railway, through the negligence of their servants. A verdict having passed for the plaintiff with £7000 damages, an application is made to this court for a new trial, on behalf of the plaintiff, on the ground of the insufficiency of the damages as well as on that of misdirection as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute: not indeed on the ground of misdirection, for we are unable to find any misdirection, the learned judge having in effect left the question of damages to the jury, with a due caution as to the limit of compen-

[14] Part of the opinion is omitted.

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sation, though we think it might have been more explicit as to the elements of damage.

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in Rowley v. London & Northwestern Ry. Co., Law Rep. 8 Ex. 231, an action brought on St. 9 & 10 Vict. c. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation." And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim.

The plaintiff was a man of middle age and of robust health. His health has been irreparably injured to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to £1000. Medical attendance still is and is likely to be for a long time necessary. He was making an income of £5000 a year, the amount of which has been positively lost for sixteen months between the ac-

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cident and the trial, through his total incapacity to attend to his professional business. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion, not only that the damages are inadequate, but that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account.

It was contended, on behalf of the defendants, that even assuming the damages to be inadequate, the court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection, or misconduct in the jury, or miscalculation, in support of which position the cases of Rendall v. Hayward, 5 Bing. N. C. 424, and Forsdike v. Stone, Law Rep. 3 C. P. 607, were relied on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider, not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case. * * *[15]

[15] Stockton, J., in Manix v. Maloney, 7 Iowa, 81 (1858):

"The motion for a new trial was upon two grounds: (1) Misbehavior of the jury; (2) newly discovered evidence since the trial.

"In support of the first ground, the defendant produced the affidavit of two of the jurors, who tried the cause, who made oath, that the jury, in order to arrive at the plaintiff's damages, agreed that each one should mark down such sum as he thought fit; that the aggregate should be divided by twelve; and that the quotient should be the verdict; that this agreement was carried out by each juror setting down his sum and dividing the aggregate by twelve; and that the quotient thus obtained, was returned to the court as the verdict of the jury.

"This conduct in a jury has been held sufficient to invalidate their verdict. Smith v. Cheetham, 3 Caines (N. Y.) 57. In the case cited, Spencer, J., said: 'If this practice be tolerated, it will prevent that discussion and examination so necessary to the development of truth and so essential to justice.' Livingston, J., said: 'Every verdict should be the result of reflection, and not the effect of chance or lot. Jurors being sworn to determine "according to evidence," suitors have a right to expect that they will examine and decide upon it, to the best of their ability and discernment. * * * Here the method of deciding as effectually precluded a proper exercise of judgment as that of chance, and, what is worse, put it in the power of any one juror, from prejudice, passion, or other bad motives, to ruin a defendant. He has only to put down a sum sufficiently large, and, if his fellows adhere to their promise, a most outrageous verdict will be the consequence.'"

Cole, J., in Barton v. Holmes, 16 Iowa, 252 (1864):

"The jury returned a verdict for the plaintiff for five hundred dollars, and the defendant moved for a new trial on the ground, among others, of miscon-

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duct by the jury in making up their verdict. In support of this ground he introduced the following affidavit of a juror as his only evidence, to wit: 'I, Curtis Wells, on my oath say that the paper hereto attached is the same paper used by me as foreman of the jury in footing up and ascertaining what the average amount of the verdict in said cause would amount to, in case it was adopted; that I was a juror in said cause.' The paper attached contained a column of figures of twelve numbers, seven of which were five hundred each; two, one thousand each; and one each of one, fifty, and three hundred, footing up five thousand eight hundred and fifty-one, and, divided by twelve, showing four hundred and eighty-nine dollars and twenty-five cents. The court overruled the motion, and this ruling is assigned as error.

"The rule is well settled that, whenever the jurors agree in advance to be bound by the result, and make up their verdict by each juror marking a sum on a piece of paper, or stating it, and the twelve sums, thus marked or stated, being added together and divided by twelve, the quotient is taken as the verdict, such finding is bad, and will be set aside by the court. Warner v. Robinson, 1 Root (Tenn.) 194, 1 Am. Dec. 38; Bennett v. Baker, cited in 1 Humph. (Tenn.) 399, 34 Am. Dec. 655; Manix v. Maloney, 7 Iowa, 81; Smith v. Cheetham, 3 Caines (N. Y.) 57; Schanler v. Porter et al., 7 Iowa, 482; Denton v. Lewis, 15 Iowa, 301. But the showing in this case falls far short of the rule. The juror does not state, in his affidavit, that there was any agreement to be bound by the result, or that any one proposed that the result of the calculation should be taken as the verdict, but simply that it was done for the purpose of 'ascertaining what the average amount of the verdict in said cause would amount to, in case it was adopted.'

"In Dana v. Tucker, 4 Johns. (N. Y.) 487, where the verdict was arrived at in a manner similar to this case, the court say: 'If the jurors previously agree to a particular mode of arriving at their verdict, and to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict.'

"In Harvey v. Jones, 3 Humph. (Tenn.) 157, the court say: 'A jury may make the experiment with a view to ascertain what the amount will be, and, if the amount produced give satisfaction, they may retain it as their verdict. But they cannot agree, before the amount is ascertained, that they will abide by it; and, if they do, it is an error for which a new trial will be granted.'

"The affidavit in this case does not show any such previous agreement to be bound, or other impropriety in the manner of making up the verdict, as will justify a court in setting it aside, and the judgment of the district court is affirmed."

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CHAPTER II.

AGGRAVATION.

DRAPER v. BAKER.

(Supreme Court of Wisconsin, 1884. 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143.)

TAYLOR, J.[1] This is an action to recover damages for assault and battery. The charge was that the appellant spit in the face of the respondent in the courthouse at Juneau, Dodge county, in the presence of a large number of persons. * * *

It is not contended by the learned counsel for the appellant that it is not competent, upon a trial of this kind, for the plaintiff to give evidence of the financial condition of the defendant when the circumstances are such that the plaintiff may be entitled to recover punitory damages; but he insists that the financial condition of the defendant cannot be shown by proof of his reputed wealth, but must be confined to facts directly showing such condition. We think the objection was not well taken. Most of the cases hold that where the financial condition of the defendant may be shown in aggravation of the damages, that the evidence shall be confined to the question of reputed wealth, and that evidence detailing or giving an inventory of the defendant's property is not admissible. * * * It would seem that where the pecuniary circumstances of a defendant are held to be admissible upon the question of compensatory damages, evidence of the actual wealth of the defendant should not be admitted; but where evidence of the wealth of the defendant is admitted for the purpose of enhancing the exemplary or punitive damages, the actual wealth of the defendant may be shown. * * *

It is urged that a new trial should have been granted because the damages are excessive. The jury assessed the damages at $1,200. If the defendant committed the assault as it is alleged he did, and under the circumstances which attended and surrounded the parties at the time,—and, so far as this court is concerned, we are bound to presume that it was so committed,—we cannot say that the damages assessed are excessive. The provocation, if any, which was offered to the defendant, his age, and all the other circumstances attending the transaction, were all undoubtedly fully presented to the jury and considered by them, and their verdict is not so large as to induce this court to believe that they were actuated by passion, prejudice, or other improper motives in giving the amount of the plaintiff's damages. * * *[2]

[1] Part of the opinion is omitted.

[2] Pollock, C. B., in Emblen v. Myers, 6 Hurl. & N. 54 (1860):
"It is universally felt, by all persons who have had occasion to consider

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FARRAND v. ALDRICH.

(Supreme Court of Michigan, 1891. 85 Mich. 593, 48 N. W. 628.)

Action of libel. Verdict and judgment for plaintiff for $1,000. The libelous article was published in the Coldwater Republican July 20, 1888, which newspaper was owned and published by the defendants.

GRANT, J.[3] * * * The jury were instructed upon the measure of damages that plaintiff was entitled to recover for injury to her feelings, character, and reputation; for humiliation, shame, and disgrace which the publication brought upon her; and for illness of body and worry of mind. Defendants insist that the jury having acquitted the defendants of malice, and therefore of willfulness in the publication, mental suffering is not an element of actual damage, If this were the rule, one of the principal elements of damage would be excluded. If a virtuous young woman is entitled to no consideration for her injured feelings when she has been publicly charged with the grossest immorality, courts might as well deny her a cause of action. Nor do we think it was error to charge the jury that they might consider the effect of that such a publication would have upon her in the future. * * *

LUCAS v. FLINN.

(Supreme Court of Iowa, 1872. 35 Iowa, 9.)

BECK, J.[3] * * * The court instructed the jury that, in estimating plaintiff's damage, they should not only consider his pecuniary loss, including loss of time, outlays for medicine and medical attendance, etc., but also the physical suffering consequent upon the injury, and the mental anguish and injury to business and social standing suffered by plaintiff. In our opinion the rule here announced is correct. The defendant's counsel insist that the latter part relating to physical suffering, mental anguish, injury to business and social standing is erroneous. They admit that, had the petition alleged the assault to have been maliciously made, the rule of the instruction could be sustained. We think there is no such limit upon the damages as is con-

the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, willful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are sometimes given in actions of trespass, but the measure of damage should be different, according to the nature of the injury and the circumstances with which it is accompanied."

Byles, J., in Bell v. Midland Ry., 10 C. B. (N. S.) 287 (1861):

"Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration and giving retributory damages."

[3] Part of the opinion is omitted.

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tended for by counsel. * * * Social standing is of value to man and is protected by the law. Injury thereto, if a direct consequence of the violence, ought to be an element in the computation of damages. The argument that damages based upon such injuries are difficult of computation cannot defeat the right to their recovery. * * *[5]

MERRILLS v. TARIFF MFG. CO.

(Supreme Court of Connecticut, 1835. 10 Conn. 384, 27 Am. Dec. 682.)

Action on the case by the owner of one moiety of a mill and water privileges against the owner of the other moiety for expelling plaintiff from the premises, and for injuries to plaintiff's business.

HUNTINGTON, J.[6] This case comes before us to correct a supposed error, in the instruction given to the jury at the trial, that, in estimating the damages, they were at liberty to take into consideration, the fraudulent and malicious motives and objects with which the defendants are charged to have committed the injury set forth in the declaration. * * * We think that the rule which ought to govern juries in assessing damages for injuries to personal property, depends, not so much on the form of the action, as on the circumstances attending the case; and that whether redress is sought, by an action of trespass or on the case (and especially where the latter is the only remedy, as in the present case), if the injury is averred and proved to have been committed maliciously, wantonly, to gratify revenge, from a spirit of ill will, and a desire to injure, or with the view of obtaining unlawfully and with a fraudulent intent, a benefit to the defendant, by means of the injury to the property of the plaintiff, these circumstances of aggravation, may, with great propriety, be considered in fixing the remuneration to which the plaintiff is entitled. * * *

In actions on the case, for injuries to incorporeal rights, where it is averred and proved that they were violated from malicious motives, with the sole design to injure, it seems to us to be consonant with the immutable principles of justice, that the same measure of redress should be awarded in such actions, as, it is admitted, would and ought to be given for similar injuries, committed in a similar manner, and where trespass would be the appropriate form of action. * * * The opinion now expressed is in accordance with the decision in Gunter v. Astor, 4 Moore, 12. In that case, it is quite apparent, that the

[5] An unproved plea of truth in slander (Warwick v. Foulkes, 12 Mees. & W. 508 [1844]), or of justification for breach of promise upon ground of plaintiff's wanton conduct (Southard v. Rexford, 6 Cow. [N. Y.] 254 [1826]; Kniffen v. McConnell, 30 N. Y. 285 [1864]), have been deemed an aggravation of the original injury. But the rule now probably is that malice must be shown. Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98 (1874); Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584 (1890).

[6] Part of the opinion is omitted, and the statement of facts is rewritten.

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court considered the manner in which the defendants committed the injury, as having been properly considered by the jury, in estimating the damages. It was an action on the case for enticing away the plaintiff's workmen from his manufactory, to go into the service of the defendants. They were invited by the defendants to a dinner—who caused them to be intoxicated, and then induced them to sign an agreement to leave the plaintiff and come to them. It was proved that the plaintiff realized about eight hundred pounds per annum by the sale of his manufactured articles; and the jury gave him one thousand six hundred pounds. A motion for a new trial, on the ground of excessive damages was made and argued; but was refused. Dallas, C. J., said: "I left it to the jury to give damages commensurate with the injury the plaintiff had sustained. The defendants clandestinely sent for his workmen, and having caused them to be intoxicated, induced them to sign an agreement to leave him and come to them; by which the plaintiff was nearly, if not absolutely, ruined. I am by no means dissatisfied with the verdict the jury have found; as the conduct of the defendants in point of fact, amounted to an absolute conspiracy." Park said: "The misconduct of the defendants, in this case, appears to have been most gross."

We think the instruction to the jury was correct. * * *

OSMUN v. WINTERS.

(Supreme Court of Oregon, 1894. 25 Or. 260, 35 Pac. 250.)

The plaintiff alleged a breach of promise of marriage and her seduction by the defendant under the promise. The jury returned a verdict for the plaintiff for $10,000.

BEAN, J.[1] * * * It is contended that seduction cannot be alleged and proved as an element of damages in an action for a breach of a promise of marriage. Upon this question there is some slight conflict in the books, but the decided current of authority, both in this country and England, is that, while damages for seduction, as a distinct ground of action, cannot be added to the damages which plaintiff is entitled to recover for a breach of the promise to marry, it may, if alleged, be shown in aggravation of damages, on the ground that compensation for the injury she has received by the breach of the contract cannot be justly estimated without taking into consideration the increased humiliation and distress to which she has been exposed by the defendant's conduct. The action is nominally for a breach of contract, but the damages are awarded upon principles more commonly applicable to actions of tort; and, if seduction is brought about by a reliance upon the contract, it may in no very indirect way be said to

[1] Part of the opinion is omitted, and the statement of facts is rewritten.

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be a breach of its implied conditions. "Such an engagement," says Mr. Justice Campbell, "brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian or confidential adviser, who cheats a confiding ward or beneficiary or client into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance, and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of injury, that cannot be lost sight of in any view of justice." Sheahan v. Barry, 27 Mich. 219. * * *

It is also claimed that the court erred in instructing the jury that if they found from the evidence that the promise of marriage was made, and justification for breaking off the promise had not been proven, and that there was seduction, then they must consider the seduction in assessing the damages. In actions of this character the question of damages belongs exclusively to the jury, subject, of course, to the power of the court to set aside the verdict if against the evidence, or when excessive damages are allowed. There are no hard or fast rules by which the amount can be determined. Each case must be dealt with according to its own particular circumstances. While seduction under a promise of marriage may be alleged and proven in aggravation of damages, yet it is for the jury alone to determine what weight, if any, is to be given to such testimony, and what effect it will have in determining the amount of damages to which plaintiff is entitled. That portion of the instruction complained of deprived the jury, in case they found the facts referred to, of all discretion upon the question as to whether they should consider the seduction in assessing damages. They were told that in that event they must so consider it. Such we do not understand to be the law. In an ordinary action for a breach of contract the amount recovered is limited to the actual damages caused by the breach. To this rule there is an exception in an action for breach of promise of marriage, because, although founded on contract, it is regarded as being somewhat in the nature of an action founded upon tort; but the cases sustaining the exception go no further than to hold that it should be left to the good judgment and discretion of the jury whether or not there should

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be added to the damages naturally resulting from a breach of the contract anything on account of seduction accomplished under the promise. * * *

From plaintiff's own testimony it appears that she was not inexperienced in the ways of the world, but was of mature years, had been married, and became engaged to the defendant, who is an old man, within two weeks after her first acquaintance with him; that she left the home of her aunt and uncle, where she was living, and went to defendant's rooms, where she claims to have been seduced, and lived with him as his "promised wife" for some time before the alleged seduction took place, and continued to live with him afterwards without complaint; and that the alleged seduction was not disclosed to any person, or known by any one except the parties, until the plaintiff consulted counsel for the purpose of bringing this action. Under these circumstances it was prejudicial error to tell the jury that if they found the seduction they must consider it in estimating the damages. It should have been left to the sound judgment and discretion of the jury, under all the circumstances of the case, with the direction that they should exercise their own judgment, and consider the seduction or not, as to them might seem just and proper. * * *

WARD v. BLACKWOOD.

(Supreme Court of Arkansas, 1883. 41 Ark. 295, 48 Am. Rep. 41.)

Massey sued Ward in an action ex delicto. After the issues had been made up, the plaintiff died. Mr. Blackwood qualified as his administrator, and the action was revived in his name and proceeded to a trial, which resulted in a verdict against Ward for two thousand dollars damages.

SMITH, J.[8] * * * The defendant was the lessee of the penitentiary. The plaintiff was employed as a guard, and was especially instructed to be viligant and never permit a convict to come nearer him than twenty-five yards. He was not a man of strong constitution and was in rather feeble health. He seems to have fallen asleep on his post about ten o'clock in the morning, and three convicts, taking advantage of his condition, disarmed him and made good their escape. They were fired upon by the other guards, and in the midst of the commotion the defendant came into the yard, and being enraged at the escape of the convicts, seized a clapboard, and struck the plaintiff three or four times over the shoulders and back.

This does not impress us as a proper case for the infliction of exemplary damages or smart money. An employer who, in a fit of passion, assaults his servant for a neglect of duty, thereby commits a breach of the peace and an actionable wrong. But if, making due

[8] Part of the opinion is omitted.

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allowance for the infirmities of human temper, the defendant has a reasonable excuse, arising from the provocation or fault of the plaintiff, but not sufficient to justify entirely the act done, then damages ought not to be assessed by way of punishment and the circumstances of mitigation should be considered. * * *

Cushman v. Waddell, 1 Baldw. 59, Fed. Cas. No. 3,516, was an action by a schoolmaster against a parent for a severe beating. The plaintiff had punished one of his pupils for some offense. The father went to the plaintiff's boarding-house, attacked and beat him savagely, accompanied by very intemperate and vindictive language and other circumstances of aggravation. The court held that no provocation could excuse the defendant from making compensation for all the injury the plaintiff had suffered by the unlawful attack. But if the jury were satisfied that, without any previous malice towards the plaintiff, or any deliberate design to injure him in person or in the estimation of the public, the defendant acted in the heat of passion, caused by the appearance and account of his son, it was a circumstance which ought to operate powerfully to reduce the damages to such as were compensatory.

In the case under consideration, there was no evidence of previous malice, nor of deliberate cruelty, only of hot blood and a certain recklessness. Ward had never seen Massey before. And Massey was very far from being free from fault. * * * Reversed.

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CHAPTER III.

EXEMPLARY DAMAGES.

HUCKLE v. MONEY.

(Court of Common Pleas, 1763. 2 Wils. 205.)

Lord Chief Justice PRATT.[1] * * * I shall now state the nature of this case, as it appeared upon the evidence at the trial. A warrant was granted by Lord Halifax, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the North Briton, number 45, without any information or charge laid before the Secretary of State, previous to the granting thereof, and without naming any person whatsoever in the warrant. Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the North Briton, number 45, directed the defendant to execute the warrant upon the plaintiff (one of Leech's journeymen), and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's counsel, and saw the solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the 29th chapter of Magna Charta, "Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale judicium parium suorum vel per legem terræ," &c. which is pointed against arbitrary power, was violated. I cannot say

[1] Part of the opinion is omitted.

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what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the Solicitor General's argument. Upon the whole I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

MEREST v. HARVEY.

(Court of King's Bench, 1814. 5 Taunt. 442.)

Trespass for forcibly breaking and entering the plaintiff's close, called Brandon Road Breck, part of Longford Field, and with feet in walking, and with dogs, treading down and spoiling the plaintiff's grass, and with dogs and guns searching, hunting, and beating for game there, and doing other wrongs. The cause was tried before Heath, J., at the Norfolk springs assizes 1814. The evidence was, that in September, the plaintiff, a gentleman of fortune, was shooting on his own manor and estate, in a common field contiguous to the highway, when the defendant, a banker, a magistrate, and a member of parliament, who had dined and drank freely after taking the same diversion of shooting, passed along the road in his carriage, and, quitting it, went up to the plaintiff and told him he would join his party, which the plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land; but the defendant declared with an oath that he would shoot, and accordingly fired several times, upon the plaintiff's land, at the birds which the plaintiff found, proposed to borrow some shot of the plaintiff, when he had exhausted his own, and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff, and defying him to bring any action. The witnesses described his conduct as being that of a drunken or insane person. The plaintiff conducted himself with the utmost coolness and propriety. A special jury found a verdict for the plaintiff for the whole damages in the declaration, £500.

GIBBS, C. J. I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the

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trespasser to be permitted to say, "here is a halfpenny for you, which is the full extent of all the mischiefs I have done?" Would that be a compensation? I cannot say that it would be.

HEATH, J. I remember a case where a jury gave £500. damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentlemen in a hundred, who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages.

Rule refused.

SEARS v. LYONS.

(Nisi Prius, 1818. 2 Starkie, 317.)

This was an action of trespass for breaking the plaintiff's close and laying poison upon it, with intent to destroy the plaintiff's poultry.

Evidence was given of the defendant's having strewed poisoned barley, both on the plaintiff's premises and his own, into which it appeared that the fowls sometimes escaped; it also appeared that some of the fowls died in consequence.

Gurney for the defendant contended that the plaintiff was not entitled to recover greater damages than the value of the fowls, and that the jury could not take into their consideration the malicious intention conceived by the defendant, and expressions which he had made use of with respect to the plaintiff.

ABBOTT, J., in summing up the jury, cautioned them to guard against the hostile feelings which the evidence they had heard was likely to excite in their minds against the defendant. The action was brought for throwing poisoned barley upon the plaintiff's premises, and destroying his poultry; and it had been proved in evidence, that he had actually committed that injury; and that some of the fowls had died, although, whether from poison thrown on the plaintiff's premises or the defendant's did not appear. It had always been held, that for trespass and entry into the house or lands of the plaintiff, a jury might consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the act had been done, whether for insult or injury, and he said, that they were not confined in this case to the mere damage resulting from throwing poisoned barley on the land of the plaintiff, but might consider also the object with which it was thrown, taking care at the same time to guard their feelings against the impression likely to have been made by the defendant's conduct.

The jury found for the plaintiff, damages £50.[2]

[2] Pollock, C. B., in Doe v. Filliter, 13 Mees. & W. 47 (1844), said: "In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into their considera-

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DAY v. WOODWORTH et al.

(Supreme Court of United States, 1851. 13 How. 363, 14 L. Ed. 181.)

GRIER, J.[3] * * * It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff for counsel-fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice

tion; but that is not the case in ejectment." See, also, Tullidge v. Wade, 3 Wils. 18 (1769); Rogers v. Spence, 13 Mees. & W. 571 (1844); Gray v. Grant, Trin. 4 Geo. III (1764); Perkin v. Proctor, 2 Wils. 386 (1768); Bruce v. Rawlins, 3 Wils. 61 (1770); Tillotson v. Cheetham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459 (1808); Woert v. Jenkins, 14 Johns. (N. Y.) 352 (1817).

[3] Part of the opinion is omitted.

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of the courts of admiralty. At first by the common law, no costs were awarded to either party, eo nomine. If the plaintiff failed to recover he was amerced pro falso clamore. If he recovered judgment, the defendant was in misericordia for his unjust detention of the plaintiff's debt, and was not therefore punished with the expensa litis under that title. But this being considered a great hardship, the statute of Gloucester (6 Edw. I, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs de incremento; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. "Costs."

Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is especially so in this country (where the Legislatures of the different states have so much reduced attorneys' fee bills, and refused to allow the honorarium paid to counsel to be exacted from the losing party), that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as expensa litis. If the jury may, "if they see fit," allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs de incremento, the defendants may be truly said to be in misericordia, being at the mercy both of court and jury. Neither the common law, nor the statute law of any state, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or Legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed costs are usually as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff pro falso clamore beyond tax costs. Where such a rule of law exists allowing the jury to find costs de incremento in the shape of counsel fees, or the equally indefinite and unknown quantity denominated (in plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant where he succeeds in his de-

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fence, otherwise the parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and assumpsit, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offence of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not wilful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other. See Barnard v. Poor, 21 Pick. (Mass.) 382; and Lincoln v. Saratoga Railroad, 23 Wend. (N. Y.) 435. * * *[4]

FLANAGAN v. WOMACK.

(Supreme Court of Texas, 1880. 54 Tex. 45.)

BONNER, J.[5] This is a civil action for damages, actual and exemplary, brought by appellant Flanagan against Womack for an alleged assault and battery committed upon him. * * * There was a verdict and judgment of one dollar actual damages against defendant.

[4] Holt, J., in Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600 (1887):

"It was improper, however, to instruct the jury, as was in effect done in this instance, that 'indecorous' conduct alone is sufficient to authorize exemplary damages. The term is too broad. It may embrace conduct which would not authorize their infliction. It is true that the peculiar element which, entering into the commission of wrongful acts, justifies the imposition of such damages, cannot be so definitely defined, perhaps, as to meet every case that may arise. It has been said that they are allowable where the wrongful act has been accompanied with 'circumstances of aggravation' (Chiles v. Drake, 2 Metc. [Ky.] 146, 74 Am. Dec. 406); or if a trespass be 'committed in a high-handed and threatening manner' (Jennings v. Maddox, 8 B. Mon. 430); or where the tort is 'accompanied by oppression, fraud, malice, or negligence so great as to raise a presumption of malice' (Parker v. Jenkins, 3 Bush, 587); or, as was said in Dawson v. Railroad Co. [6 Ky. Law Rep. 668], where the wrongful act is accompanied by 'insult, indignity, oppression, or inhumanity.'

"It would, however, be extending the rule unwarrantably to hold that they could be imposed provided the conduct was merely 'indecorous.' This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, or, indeed, generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

"In the case now under consideration the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next one, or in merely telling her that she could walk back to her station; yet none of these things amounted to 'insult, indignity, oppression, or inhumanity.'"

[5] Part of the opinion is omitted.

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Among other defenses, Womack pleaded that on indictment for the same offense he had been convicted and a fine of $100, besides costs of suit, adjudged against him in the county court, which he had paid. A demurrer to this plea was overruled, testimony was admitted to sustain it, and the jury instructed that they might consider it in mitigation but not in bar of the claim for exemplary damages.

The doctrine upon which the learned judge below doubtless acted in overruling the demurrer and admitting the testimony has been the subject of great diversity of opinion and discussion among judges and jurists. If it were now an open question in this court, the individual opinion of the writer would be that it was not well founded in principle, and that there was error in the judgment of the court.

It is perhaps due myself that I very briefly give the reasons for this belief.

The doctrine of exemplary damages doubtless originated from those cases in which a sense of justice to the injured party demanded that more compensation should be given him than could be allowed by any defined strict legal rule for the measure of damages. Frequently the mere physical injury sustained, and which ordinarily is the test of actual damages, would of itself be comparatively insufficient, but the outrage upon the feelings—the ordinary test of what is now usually called exemplary, vindictive, or punitory damages—would be of such gross character or under such indignant circumstances as should require ample reparation from the offender, but which could not be referred to any fixed primary standard. Hence, this character of damage was, in a great degree, necessarily left to the discretion of the jury trying the particular case. Indulgence was extended by the courts to such verdicts, as they tended to prevent breaches of the peace, and to encourage, by a resort to the law of the land, the settlement of difficulties which otherwise might have ended in personal conflicts. To this extent the public also was interested.

This indirect result to the public good led some courts into the error of assuming as one of the grounds why such damages should be allowed at the suit of a private party that it was intended as a public punishment to the offender, thus making that an active cause which originally was but a passive result, and in this way converting private recompense into public punishment.

I do not doubt the propriety of allowing full compensation to the injured party for both that damage which can be reduced to a reasonably fixed money standard, usually called actual damages, and also for that damage which should be recovered, but which cannot, in the nature of things, be determined by any such standard, but which must be left to the sound discretion of the juries and courts of the country, and which are properly included under what is now called exemplary damages. Such damages have received the approval of the courts of last resort of at least twenty-nine states of the Union, including this

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state, and of the Supreme Court of the United Sates. Field, Dam. p. 23, note 2.

The difficulty has arisen in adding an improper ground for such damages,—punishment, instead of recompense; thus opening too wide the door for unreasonable verdicts by juries in civil suits, there not being with us in such cases, as under the Criminal Code, any limitation upon the amount of the verdict which may be found.

Punishment for offenses should be inflicted only by public prosecution in due course of the law of the land, under those safeguards which are "rooted and grounded in the maxims of the common law, and guarantied by the constitution of our political government."

If such damages are allowed as recompense only, and not as punishment, then we avoid the illegality and hardship of inflicting a double punishment for the same offense.

The criminal prosecution is a suit between the government and the defendant, to which the plaintiff in the civil action is not a party, and in which he has no voice. If, in the opinion of the jury trying the civil action, the conviction and fine in the criminal prosecution was a sufficient punishment, then the plaintiff, so far as regards his exemplary damage as a recompense, has been deprived of his just rights without ever having had his day in court.

The only consistent theory upon which the judgment in the criminal prosecution can be admitted in mitigation of damages in the civil action is that by a fiction of the law the plaintiff in the latter represents the public, and that to this extent the two suits are considered as between the same parties, and that the fine in the one should decrease the amount of the judgment in the other,—a fiction which, as above shown, may work a great hardship on the plaintiff.

This testimony is admitted solely for the benefit of the defendant, not the public, and it is not perceived on principle, if such evidence can be admitted in mitigation, why it should not also be admitted in bar; or why it would not logically follow that, if the defendant had been acquitted instead of having been convicted, he could not plead this former acquittal in bar; or, as the rights of the parties should be mutual, why, if the civil suit had been first tried and judgment rendered against the defendant, this should not be a mitigation or bar to the criminal prosecution. That such should be the rule in mitigation, if not in bar, in those tribunals where the injured party, as private prosecutor, receives part of the fine, would seem proper; but to permit it in this state, where the fine is paid to the government and not to the prosecutor, would in many cases virtually supersede the criminal law.

Thus considered, the testimony of the former conviction and fine would not have been admissible. * * *

Whatever may be my individual opinion, however, I feel constrained, from a long and uniform course of decisions on this subject in this state, and for this reason only, to concur with the other members of

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the court in the opinion that the court below did not err in overruling the demurrer and admitting the evidence. * * *

If exemplary damages are allowed as punishment and not strictly as compensation, then all the facts and circumstances of the case which would enable the jury to act advisedly in inflicting the appropriate punishment would be proper for their consideration. In this view the assigned error was not well taken. Field, Dam. §§ 89–91, 121–123, and authorities cited. * * *

That much of the charge by which the jury were instructed that exemplary damages could not be recovered without proof of actual or compensatory damages is assigned as error. The proposition contained in the charge is believed to be correct. * * *

SPOKANE TRUCK & DRAY CO. v. HOEFER et ux.

(Supreme Court of Washington, 1891. 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842.)

DUNBAR, J.[6] The plaintiff Mina Hoefer had her arm broken, and was otherwise injured, by the falling of a safe, which was being hoisted by the defendant into a five-story brick building, known as the "Eagle Block," in the city of Spokane Falls. * * * Suit was brought against the defendant, alleging damages in the sum of $5,000. The case was tried by a jury, and a verdict rendered for plaintiffs for $2,500, and a judgment rendered for the same, from which judgment an appeal was taken to this court.

The defendant assigns as error the following instructions to the jury, given by the court upon its own motion: "Furthermore, gentlemen, the plaintiffs claim in this action that the defendant was not only guilty of negligence, by reason of which the plaintiff was damaged, but was guilty of gross negligence, and, in case you find they were guilty of gross negligence, a different rule of damages applies to the case." "'Gross negligence' means a wanton and reckless disregard of the rights of other persons taken into consideration with the facts in the case; and, in case you find that it was, then, in addition to the actual damages which you may find for plaintiff, you may assess a sum which the law calls 'exemplary damages.' That means a damage to deter others from being wanton and reckless of the rights of others." * * *

We next pass to the instruction of the court both upon its own motion and upon the motion of the plaintiffs in relation to punitive damages. This is a question which has engaged the earnest attention of courts and authors. A careful investigation of the discussion of this subject by such noted authors as Greenleaf, Sedgwick, and Parsons, and also other eminent text-writers, and by numerous courts, shows a

[6] Part of the opinion is omitted.

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wonderful diversity of opinion on this interesting subject. The weight of authority, especially considering the older cases, seems to be in favor of the doctrine of punitive damages, but the opposite doctrine has received the support and advocacy of many modern writers, and the judicial sanction of many modern courts; while other courts have frankly stated their repugnance to the doctrine, yet considered themselves bound, by former decisions in their respective states, to still maintain it, appealing to the Legislature to relieve them from what they believe to be a pernicious practice. In this state it is a new question, and the court approaches its investigation untrammeled by former decisions, free to accept the reasoning which most strongly appeals to its judgment, and to adopt the rule which, in its opinion, will simplify judicial proceedings, and lead to the least embarrassing complications in the administration of the law, and the determination of rights thereunder. And this desired ultimatum, we think, will best be attained by adopting the rule laid down by Mr. Greenleaf (volume 2, § 253) that "damages are given as a compensation or satisfaction to the plaintiff for an injury actually sustained by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or his estate"—although it is stoutly maintained by so eminent an author as Mr. Sedgwick that this definition is too limited, and that, "wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms 'punitive,' 'vindictive,' or 'exemplary' damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." 1 Sedg. Dam. p. 38; Id. (7th Ed.) p. 53. It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions "from the time whereof the memory of man runneth not to the contrary," are absolutely ignored. Under this procedure the doctrine of presumption of innocence, until proven guilty beyond a reasonable doubt, finds no lodgment in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited, save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages, on a smaller weight of testimony than he can be

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in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and, in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face under the practice in civil actions of admitting depositions in evidence. Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, laceration of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. Ordinarily the administration of the laws is divided into two distinct jurisdictions, the civil and the criminal, each governed by rules of procedure, and by rules governing the admission and weight of testimony different and distinct from the other. The province of the civil court is, as its name indicates, to investigate civil rights; there its jurisdiction ends, or ought to end; while the province of the criminal court is, as its name imports, to investigate and punish crime and restrain its commission. And it is to the criminal, and not the civil, jurisdiction that society looks for its protection against criminals. The object of punishment is not to deter the criminal from again perpetrating the crime on the particular individual injured, but for the protection of society at large; and as the state is at the expense of restraining and controlling its criminals, and as fines are imposed for the double purpose of restraining the offender, and of reimbursing the state for its outlay in protecting its citizens from criminals, we are at a loss to know by what process of reasoning, either legal or ethical, the conclusion is reached that a plaintiff in a civil action, under a complaint which only asks for compensation for injuries received, is allowed to appropriate money which is supposed to be paid for the benefit of the state. It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff who has already been

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fully compensated, a theory which is repugnant to every sense of justice.

Again, while jurors should be the judges of the character and weight of testimony, that judgment should be exercised under some rule, and be amenable to some law, so that an abuse of discretion could be ascertained and corrected; but, under the doctrine of punitive damages, where the whole question is left to the unguided judgment of the jury, and where, under the very nature of the doctrine, no measure of damages can be stated, and hence no limits compelled, where there are no special findings provided for, it would not be often that a court would be warranted in interfering with a verdict, if indeed it could do so at all, if the verdict fell within the amount asked as compensatory damages. Take the case at bar for instance, and the court has no way of ascertaining whether the jury found that the plaintiff had actually been damaged to the full amount of $2,500, or whether they found her actual damages to be $500, and assessed the other $2,000 by way of punishment. It seems to us that a practice which leads to so much confusion and uncertainty in the administration of the law, and that is always liable to lead to injustice, the correction of which is impracticable, cannot be too speedily eradicated from our system of jurisprudence. In this connection, we quote approvingly the language of the Supreme Court of Indiana in Stewart v. Maddox, 63 Ind. 51. Says the court: "The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages in each case; and in a case where the defendant is a commanding, popular, influential person, and the plaintiff of an opposite character, and the local and temporary excitement of the time happens to be in favor of the defendant, the jury is apt to be reluctant in giving even pecuniary compensation, without adding anything by way of exemplary or punitive damages;, while, in a case in which the character of the parties and the circumstances are reversed, the jury will be liable to push their powers to an unwarranted and unconscionable extent, dangerous to justice and the security of settled rights." Says the court in Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366: "The reflecting lawyer is naturally curious to account for this 'heresy' or 'deformity,' as it has been termed. Able and searching investigations made by both jurists and writers disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherforth; that it was not recognized in the earlier English cases; that the Supreme Courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan, and Georgia have rejected it in whole or in part; that of late other states have falteringly retained it because committed so to do; that a few years ago it was correctly said, 'At last accounts the Court of Queen's Bench was still sitting hopelessly involved in the

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meshes of what Mr. Chief Justice Quain declared to be "utterly inconsistent propositions;" ' and that the rule is comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases." And in support of this theory the Colorado court quotes Mr. Justice Foster in Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, who concludes a discussion of the expression "smart money" as used by Grotius and jurists contemporary with that author, in the following language: "It is interesting, as well as instructive, to observe that one hundred and twenty years ago the term 'smart money' was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrongdoer smart." Some courts have held that it was in violation of the constitutional guaranty "that no person should be twice put in jeopardy for the same offense," where the criminal code provided a punishment for the same offense, and some have restricted or limited its abrogation to cases where the act charged to have been committed was made punishable by law; but, without expressing any opinion on the constitutional question, we believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice, and that the instruction of the court on the subject of punitive damages was erroneous. With this view of the law it is not necessary to examine the further objection urged by defendant, "that this was not a proper case for the application of the doctrine of punitive damages." * * *[7]

SMITH v. BAGWELL.

(Supreme Court of Florida, 1882. 19 Fla. 117, 45 Am. Rep. 12.)

VAN VALKENBURGH, J.[8] This was an action brought by Bagwell against Smith for assault and battery. The cause was tried at the Duval circuit in May, 1882, and the jury found for the plaintiff in the sum of $300 damages, besides costs. The defendant moved for a new trial, which was denied. He then brought his appeal from the judgment to this court. * * *

The last error assigned is that the court refused to charge, "that in actions for damages for torts, also punishable criminally, punitive or exemplary damages are not recoverable." The court charged the jury

[7] Where the jury may, it is not required to, give exemplary damages, even though the facts justify the allowance. Robinson v. Superior R. T. Co., 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897 (1896).

As to a child's responsibility for exemplary damages, see article in 38 Am. Law Rev. 380.

[8] Part of the opinion is omitted.

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upon the question of damages as follows: "If you find from the evidence that the defendant did commit assault and battery as alleged in the declaration, you may, in measuring the amount of damages, estimate the loss of time and labor from the time the assault and battery was committed, and the value of his services as proved; also expenses incurred for medical and surgical attention, diminished capacity to work at his trade arising from injuries received by said assault and battery; and you may give him such compensatory damages in addition for the bodily pains and suffering arising from such injury as you may think the circumstances and the evidence will warrant." We see nothing wrong in this charge of the court. The damages which the jury were to assess against the plaintiff in case they found from the evidence that he had committed the battery alleged in the declaration were compensatory—such as would compensate him for his expenses, time, and for bodily pains arising from the infliction of the injury. There was no intimation upon the part of the court in this charge that the jury could or should give punitive damages or damages in the nature of a punishment. There is nothing said whereby the jury could possibly be induced to take into consideration the malice of the plaintiff, the personal indignity, the wounded feelings or public example—all of which enter into punitive damages. The evidence shows that defendant committed an aggravated battery upon the plaintiff; that the defendant struck him several times over the head with an oak wood wagon spoke about two feet long; that from the effects of such beating he was laid up for two months; that plaintiff was a wheelwright; that a good wheelwright might get from $2.50 to $3 per day; that he still suffered from the blows he received on his arm and head. The surgeon who attended plaintiff testified that he found him suffering from scalp wounds and a bruised arm, caused by blows; that he treated the wounds in the head by adhesive plaster. One of the wounds he sewed up. The arm was badly bruised. Erysipelas followed, which gave him trouble. This is very often the result of blows on the head. He attended him for two weeks and his bill was $30. Upon this evidence the jury, after consideration, and after hearing and seeing witnesses and the parties, rendered their verdict.

The defendant's counsel insists that the court erred in not charging the jury that punitive or exemplary damages were not recoverable. Whether such instructions were or were not given in this case under the circumstances attending it, and the charge given as above quoted, is of no consequence. The jury evidently found only compensatory damages; that is, "loss of time and labor from the time the assault and battery was committed, and the value of his services as proved; also expenses incurred for medical and surgical attention, diminished capacity to work at his trade arising from injuries received by said assault and battery," and "compensatory damages for the bodily pains and suffering arising from such injury."

Bodily pain and suffering is a proper item of damages in such cases.

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"Nor is the estimate necessarily limited to the suffering which is past where the proof renders it reasonably certain that future pain and suffering is inevitable. In estimating the pecuniary loss in such cases all the consequences of the injury, future as well as past, are to be taken into consideration; and there seems to be no reason why a different rule should prevail in respect to bodily pain and suffering." Curtis v. Railroad Co., 18 N. Y. 534, 75 Am. Dec. 258; Id., 20 Barb. (N. Y.) 282; Ransom v. Railroad, 15 N. Y. 415.

Compensatory damages are such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses; and to these may be added bodily pain and suffering. Exemplary, vindictive, or punitory damages are such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer, but a punishment to the offender and an example to the community.

In this case the defendant was liable to be punished criminally for the assault and battery committed upon the plaintiff. Whether he was so punished by indictment and trial or not, we are not informed by anything in the record. The counsel for defendant below insists that to allow punitive or exemplary damages in an action of this character would be in contravention of the Constitution, which provides that no person shall be put twice in jeopardy for the same offense. We are aware that the rule in regard to such damages is different in the different states of this country, and that whether they can be legally awarded in any case is a question about which different and conflicting opinions have prevailed. In the case of Chiles v. Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406, Chief Justice Simpson, speaking for the court, says: "It will hardly be contended that a plaintiff cannot recover vindictive damages in an action for an assault and battery committed with circumstances of aggravation, although the defendant might be indicted for the same offense. The recovery in the one case is for the private injury, and in the other the punishment is inflicted for the public wrong. Vindictive damages operate, it is true, by way of punishment, but they are allowed as compensatory for the private injury complained of in the action. They are allowed because the injury has been increased by the manner it was inflicted." "Every recovery for a personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is a punishment which results from the redress of a private wrong, and does not therefore violate either the meaning or spirit of the Constitution." Again, the court say:

"Where the element of willful negligence, malice, or oppression intervenes, the law permits the jury to give what is termed punitory, vindictive, or exemplary damages; and such damages, although given to recompense the sufferer, do inflict a punishment upon the offender. But such is the effect of every judgment for damages which is rendered in an action for an injury to the person, and there would be as much propriety in the argument that, as damages in such case

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always operate as a punishment, the offender, if the act is one for which he is liable to be indicted, will be thereby twice punished for the same offense, as there is that such an effect is produced where the damages are increased and made exemplary on account of the reckless conduct of the offending party."

The case of Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582, was one in which an appeal was made to the court, as in this case, to exclude the rule of punitive or exemplary damages in actions of tort punishable as crime, founded upon a clause in the Constitution of that state similar to our own, providing that no person for the same offense shall be twice put in jeopardy of punishment. Ryan, C. J., says: "It would have been no subject of regret to the court if the obligation of the Constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question. The Constitution only re-enacts what was the general, if not literally universal, rule at common law. See authorities collected in 1 Bish. Cr. Law, §§ 980–987. The word 'jeopardy' is therefore used in the Constitution in its defined, technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information, or otherwise. * * * The whole purview of section 8 plainly shows that the putting in jeopardy prohibited is confined to criminal prosecutions. Indeed, this is manifest in the clause itself, which is confined in the same offense, used in the same sense as 'criminal offense' in the first clause of the section. Of course, the same act may be an offense (in the sense of crime) against the state and an offense (in the sense of a tort) against a private person. It is manifest that judgment for the one is not a bar to the other; and it might be difficult in principle to hold a criminal conviction as a bar to the recovery of punitory damages in a civil action, and not a bar to the recovery of compensatory damages; not a bar to any civil action. See Jacks v. Bell, 3 Car. & P. 316. The radical difficulty in the position of counsel appears to be the judgment for the criminal offense is for the offense against the public; judgment for the tort is for the offense against the private sufferer; that, though punitory damages go in the right of the public, for example, they do not go by way of public punishment, but by way of private damages, for the act as a tort, and not as a crime, to the private sufferer, and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him for himself as damages allowed to him by law in addition to his actual damages; like the double and treble damages sometimes allowed by statute. Considered as strictly punitory, the damages are for the punishment of the private tort, not of the public crime." * * *

This question has elicited much discussion, and the books are full of it. The courts in some of the states have held to the doctrine, as contended for by the counsel for the appellant, that in a civil action for a tort, punishable also criminally, punitive or exemplary damages can-

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not be given by the jury; and we have carefully examined all these authorities. The current of the decision is in the contrary direction, and we can but hold that the court below did not err in refusing to give to the jury the instructions in this respect requested. * * *

GODDARD v. GRAND TRUNK RY. OF CANADA.

(Supreme Judicial Court of Maine, 1869. 57 Me. 202, 2 Am. Rep. 39.)

Action against the Grand Trunk Railway of Canada to recover damages for an assault made on a passenger by a brakeman in defendant's employment. Verdict for $4,850.

WALTON, J.* Two questions are presented for our consideration: First, is the common carrier of passengers responsible for the willful misconduct of his servant? or, in other words, if a passenger who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole traveling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand. * * *

It appears in evidence, that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in

* Parts of the opinions of Walton and Tapley, JJ., are omitted.

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fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified: that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless by direct or implied authority to the servant, he consents to the unlawful act." * * *

What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

In 1763, Lord Chief Justice Pratt (afterwards Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages. Huckle v. Money, 2 Wils. 205.

In another case the same learned judge declared with emphasis, that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty. 5 Camp. Lives Chan. (Am. Ed.) p. 214.

In 1814, the doctrine of punitive damages was stringently applied in a case where the defendant, in a state of intoxication, forced himself into the plaintiff's company, and insolently persisted in hunting upon his grounds. The plaintiff recovered a verdict for five hundred pounds, the full amount of his ad damnum, and the court refused to set it aside. Mr. Justice Heath remarked in this case that he remembered a case where the jury gave five hundred pounds for merely knocking a man's hat off, and the court refused a new trial. It goes, said he, to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages. Merest v. Harvey, 5 Taunt. 442. See, also, to the same effect, Sears v. Lyon, 2 Starkie, 317 (decided in 1818).

In 1844, Lord Chief Baron Pollock said, that in actions for malicious injuries, juries had always been allowed to give what are called vindictive damages. Doe v. Filliter, 13 Mees. & W. 50.

In 1858, in an action of trespass for taking personal property on a fraudulent bill of sale, the defendant's counsel contended that it was not a case for the application of the doctrine of exemplary damages;

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but the court held otherwise. No doubt, said Pollock, C. B., it was a case in which vindictive damages might be given. Thomas v. Harris, 3 Hurl. & N. 961. * * *

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own willful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; these were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put

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in the stocks—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country. * * *

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? * * * It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveler upon that road, to

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have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road. * * *

It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but to trust to the law and to the courts of justice, for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury. * * *

TAPLEY, J., did not concur upon the question of damages, and gave his opinion as follows:

In so much of the opinion of Mr. Justice WALTON as determines the question of the liability of the defendants to answer in damages for the acts of the brakeman Jackson I concur; but I do not concur in sustaining the rulings of the court at the trial of the cause fixing the rule of damage for the jury; and I regard it so clearly wrong in principle, inequitable and unjust in practice, and so entirely wanting in precedent, that my duty requires something more than a silent dissent. * * *

If the act of Jackson was a willful, wanton, and malicious trespass upon his part, and was neither directly nor impliedly authorized or ratified by the defendants, the act was neither in fact nor legal intendment the act of the defendants. This is quite clear from reason and authority. Although it may be one which devolved upon them a liability, it is in no sense their act; so that, if ordinarily the malice of the acting agent was so inseparably connected with the act that it would attach to the principal, nolens volens, in those cases where, by legal intendment, it was his, the principal's act, in this case it would not, it being neither in act or legal intendment the act of the defendants.

The requested instruction clearly presented the proposition that unless the act was authorized directly or impliedly, or subsequently ratified by the defendants, they could not be chargeable with the motive and intent of the actor. This was refused and the rule left, that, regardless of authorization or ratification, they might be punished for the willful, wanton, and malicious acts of Jackson. * * *

An effort is made to make corporations an exception to the rule, although all the authorities, whether found in elementary treatises or judicial decisions, place them upon the same footing. The idea put forward seems to be, that the servant is the corporation. In order, however, that the position may certainly stand as it is made, and the

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argument proceed upon no erroneous deductions of mine, I quote: "A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants, and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and those minds and hands are its minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation is 'sheer nonsense,' and only tends to confuse the mind and confound the judgment."

In relation to this proposition one inquiry may be made, viz.: Have these servants no "minds," no "hands," and no "schemes" except those of the corporation? Are all their schemes, all their acts, and all the emanations of their minds those of the corporation? If they have any other, shall the corporation be punished for them?

Does not the argument attach a responsibility to the corporation for all the acts of a person in its employ? If it does not, where is the dividing line? It is all, or part. What part? This is the question which law-writers and judges have been answering for many years, and whether, in the estimation of any, it be or not "sheer nonsense," they have distinguished between those acts of the agent for which the corporation is, and those for which it is not liable.

What its "voice" commands, what its "hands" do, and the "schemes" which it executes, it should be and is held responsible for, whether done by direct or implied authority or subsequently ratified by them; and when they do this in wanton and willful disregard of the rights of others, they may, under the law as now administered, be punished by punitive damages.

But when the "voice" which speaks, and the "hand" which executes, is not that of the principal, however wanton, willful, and malicious it may be, the "stones," even "cry out" against inflicting upon him a punishment therefor, and the more wanton and malicious the act, the more horrible is the doctrine.

Corporations are but aggregated individuals acting through the agency of man. They may consist of a single individual, or more, and they are no more ideal beings when thus acting than the individual thus acting. For certain acts the individual, though not manually engaged in it, is held responsible. For the same acts the body of individuals, denominated a corporation, are held responsible. The principal and agent, in both cases, are separate and independent beings. Agents presuppose a principal—somebody to act for. Somebody whose orders they are to execute, and somebody for whom they are to perform service; somebody who is answerable to them, and who may be answerable for the acts done under their direction. Mr. Justice Brown, in Hibbard v. Railroad Co., 15 N. Y. 467, before cited, says, "The

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conductor and those who aided him are not the company; they are its agents and servants." If the employé and servant is the corporation, in fact or legal intendment, it does not act through agents. Its acts are all the direct acts of principals without the intervention of any other power, and it carries us back to a responsibility for all the acts of a person employed by a corporation, whether those acts have any relation to his particular employment or not, a proposition too absurd and monstrous in its results to be entertained at all. Mr. Justice Campbell, in giving the opinion of the Supreme Court of the United States, in the case before cited (Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73), says, the result of the cases is that for acts done in the course of its business and of their employment "the corporation is responsible, as an individual is responsible, under similar circumstances."

I, therefore, come to the conclusion that if liable at all to be punished for the malice of Jackson, it must be upon some other ground than their legal identity with him, and that in no sense can his malice be said to be their malice; and there seems to be strong indications in the charge of the presiding judge, that he, at that time, placed it upon no such grounds. The defendants, in view of this assumption by the plaintiff, "requested the presiding judge to instruct the jury that the plaintiff is not entitled to recover against the defendant company any greater damages than he might recover against Jackson himself, for the same cause of action upon similar evidence." This instruction the court declined to give, and remarked to the jury, "I think you cannot rightfully be required to enter into a consideration of the damages which a party, not now before the court, and has not, therefore, had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard by those which you think might be just in another case which has not been heard. We will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right."

I think the argument is very strong from this remark, that it was not the malice and ill-will of Jackson that was designed to be punished, for he says his case has not been heard The court say, substantially, we know not what excuses or justification he may offer when heard, if ever, "and when his case comes before us, if ever it does, we will endeavor to decide that right." One would suppose that it was some "wanton, malicious act, committed in reckless and willful disregard of the rights of the injured party," by these defendants that was to receive such punishment as should "serve a warning and example to others," and not such an act done by Jackson. The argument would seem to proceed and say Jackson, for his act, may deserve one punishment, and those defendants, for their acts, may deserve another; and I cannot well forbear the inquiry here, if there is not here some evidence of an "attempt to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant, and the

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malice of the corporation; or the punishment of the servant, and the punishment of the corporation?" Was it here that "sheer nonsense" was enacted, and "the mind confused," and the "judgment confounded"?

If it was the malicious act of the defendants that was to be punished, the enormity of Jackson's wrong had indeed nothing to do with it. If it was the malicious wrong of Jackson that was to be punished, why should a party, innocent of all wrong in the matter, be punished more than the wrong-doer himself. If he was the corporation, why would not all the acts of extenuation and justification surrounding him be also the acts of the corporation, and be proper elements to be considered in graduating or fixing the penalty? How could his case come before us, if he was the corporation? Would it be to be punished for the act of the corporation?

If we hold both guilty and both liable, it must be founded upon the idea of two actors, and that the employé is not only the corporation but somebody else, and the nonentity of agent becomes itself a nonentity, and instead of a mere imaginary thing which swallows up and extinguishes all the relations of principal and agent, and renders any attempt to distinguish between them "sheer nonsense," we do have two distinct, independent, accountable subjects, susceptible of being brought before the courts to answer and be punished, and we are not left to the ideal action of punishing an ideal existence. Again; if the actor is brought before the court and punished, would he be punished for the act of the corporation or his own act? for the malice of the corporation, or his own malice? If imprisoned, should we say the corporation was imprisoned?

If not, and he is (as undoubtedly he may be) called to answer for an assault, and punished for an assault, when we come to fix the punishment, do we not distinguish between his guilt and the guilt of the corporation, his malice and the malice of the corporation? And when the rule is required that we punish him in the same manner and to the same extent as the corporation, should we not reply very much as did the presiding judge at the trial? I think there can be no two opinions about the matter, and that there is manifestly a distinction between the two, and that there are two to distinguish between, and that when the act is not authorized by any previous command or subsequent adoption, it is not, and cannot in the nature of things be made the act of another than the actor. Laws may be made making others responsible therefor, but it is the act of him who does it, and not of him who neither does nor authorizes it; and no amount of judicial legislation or refinement can make it so; as before remarked, it is not possible in the nature of things. * * *

The learned judge then adds, "And it might as well not be applied to them at all, as to limit its application to cases where the servant is directly and specially directed by the corporation to maltreat and insult a passenger, or to cases where such an act is directly and specifi-

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cally ratified; for no such cases will ever occur." The instruction requested and refused, used the term directly or "impliedly," and with this sentence so amended, I have simply to say, that if no such case ever does occur, there is no occasion, right, or propriety in inflicting the punishment. If the act is neither directly nor impliedly authorized or ratified, there is in it no wantonness, no malice, and no ill-will toward the person injured, and no public wrong by them done to be redressed or atoned for. Repentance with them is absolutely impossible. The argument is simply this: If we do not punish you when you do not directly or impliedly authorize or adopt a wrong, we shall never have an opportunity, for you never will thus authorize or adopt one. The argument is clearly stated by the learned judge, and I leave it as he left it, remarking that, if the end to be attained is the punishment of railroad corporations whether guilty or innocent, the rule requiring them first to be guilty of wrong had better be abolished. * * *

The plaintiff, in the printed brief of his argument presented in this case, says: "If, therefore, an individual master, perhaps personally innocent of positive evil intent is liable to punishment by exemplary damages for the malice of his servant, for a much stronger reason ought a soulless corporation to be responsible for the wicked and wanton acts of its sole representative."

In my judgment, if the premise were right in this proposition, there is no reason why the conclusion is not right. But I know of no case where the master, innocent of all wrong upon his own part, has been held to be liable to punishment for the malice of his servant. It is only where he has been a participator in some manner in the wantonness and malice displayed in the act, and it is his own wanton and malicious act that is then punished. The plaintiff says further: "Besides, if corporations cannot be reached in exemplary damages for the malice of their servants, they escape entirely, and thus stand infinitely better than citizens who are liable in punitory damages, not only for their own personal acts, which latter it is obvious a corporation can never be guilty of in the strict sense." If citizens were liable in punitory damages for the malice of their servants, in nowise participated in by themselves, the conclusion that corporations would stand better than citizens, if they escaped a punishment for the malice of their servants, is irresistible; but again I say, I know of no law, authority, or reason for holding an innocent citizen to punishment for the malice of his servant or agent. It is quite as much as one can reconcile with just accountability to hold him to compensate for injuries maliciously inflicted in the course of his employment, without adding punishment.

The theory of punitive damages is the infliction of a punishment for an offense committed. It presupposes the existence of a moral wrong, an infraction of the moral code; a wrong in which the community has some interest in the redress, and in securing immunity from in the future. It presupposes also an offender, and designs to punish that offender. To punish one not an offender is against the whole theory,

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policy, and practice of the law and its administrators. "It is better that ten guilty men should escape than one innocent man should suffer." Before the smallest fine can be inflicted, evidence, leaving no reasonable doubt of the guilt of the party to be thus punished, must be adduced; evidence that he possessed the evil intent, wicked and depraved spirit; that it was he that was regardless of social duty. The idea of punishing one who is not particeps criminis in the wrong done is so entirely devoid of the first principles and fundamental elements of law, that it can never find place among the rules of action in an intelligent and virtuous community. There is no parallel, for it is in the administration of the law, and courts of the highest repute have, whenever the question has arisen, declared it unsound in principle and inequitable in practice. * * *

Some comment is made concerning the retention of Jackson in the defendant's employ. All that I find, in the report of the case concerning the matter, is a statement, made by the plaintiff in his testimony, that he had seen him several times since, in performance of duties upon the train.

So far as any question arises upon the rule of damages laid down in the instruction, it is quite apparent this is perfectly immaterial, and could be regarded, in any event, only as remote evidence of ratification. If he was retained in their employ, we do not know under what circumstances; possibly they were such as would have furnished to the mind of any reasonable man a perfect justification; sitting here, we must take the report as we find it. The opinion states that the jury undoubtedly regarded it as "a practical ratification and approval of his conduct." Could they have done so if they had been correctly instructed in the theory now advanced? What was there to ratify? Yea, more, who was there to ratify? If the servant is the corporation, and the act of commission was the act of the corporation, was there anything to ratify? Was it not an original act of the corporation? Did they ratify their own act? If the act of commission was originally theirs, the act of retention was a subsequent act, having no relation to the first. Did that infringe any right of his? If it did, it was a new and substantive cause of complaint not embraced in this declaration. If, however, the theory which is now advanced is not only novel but unsound, and that previous command or subsequent approval was necessary to warrant the infliction of punishment, the matter was of vital importance, and the defendants should have had the advantage of the instruction. It is not quite right, I think, to now assume that the jury regarded it as a ratification. Possibly the gentlemen composing that jury were not quite prepared to find that the gentlemen composing the administrative and executive departments of that corporation were so lost to all that is decent and honorable among men, and so blind to their own interests that they would justify an act condemned by everybody. Giving full force to the encomiums bestowed in the opinion upon juries might we not conclude that

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they would be more likely to infer, from the circumstances, that such amends had been made as honorable gentlemen would require, rather than convict them of an act that any prison convict would cry out against?

Will it do to shield the verdict with that which the jury were substantially told was immaterial?

I have not considered this case upon the motion, or upon any facts supposed to be proved by the evidence reported, nor have I considered the question whether under the plaintiff's declaration, he can recover upon the grounds set forth in the opinion. I have only considered the rule advanced by the instructions. Under this rule a railroad corporation may exercise all possible care in the selection of servants, and strictly enjoin them from day to day against any irregularity of conduct; yet if one of them, unmindful of his duty, regardless of his master's interest, and bent on exercising some private malice against a person who happened to be a traveler, assaults him, the corporation must not only make full compensation for all the injury, under the most liberal rules, but may be punished for an act they have used every endeavor within the reach of human power to prevent, one committed by another, against their wishes, interest, and positive commands; and it is to be such a punishment as will "serve as a warning and example to others."

If we were punishing the actor himself, we should consider the probable effect of a given punishment upon him; but when, for his offense, we punish another, how can we form any idea of the influence of a punishment he cannot feel. The master may discharge him from his employment, and he thus feel the punishment another suffers indirectly, and to that extent. It will be perceived, however, that this is the extent for all classes, kinds, and degrees of offense. It is the only channel through which he can be made to feel it. But suppose it were otherwise, is the punishment which is inflicted upon the innocent party any the less keen, unjust, and onerous?

Is that in any degree affected by the manner in which the offender receives the intelligence of its infliction upon another? Again; how shall the corporation avoid the constant recurrence of penalties for the offenses of others? Can they, when they select another servant, exercise any more care or be more watchful over him? Can they change the passions of men? What is their fault if they have exercised all the care, wisdom, and prudence with which men are invested? Must they be punished for not being omnipotent?

If the idea and design of punishment is to restrain the offender and make the punishment serve as a warning to others, how can it better be done than by making it personal; inflicting it upon the offender? How can its influence upon others be made more restraining than by the reflection that they must personally suffer the same punishment if they offend? Is the reflection that others will suffer it, more potent with that class of individuals? Has the observation of men led to

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this conclusion? And if it has, have all the principles of reason, right, and justice yielded to it and made it right?

If the punishment, thus inflicted, is to serve as a warning to others, who must take warning? Evidently the innocent as well as guilty. The innocent are to be the greatest sufferers by reason of the offense, and punished alone directly. It is to serve as a warning to all innocent persons, that they may be punished for the offenses of others, after having fully compensated the injury done.

One other consideration I barely suggest. The liability in this case is based upon a contract; purely so. No liability could, under the proof, arise by the rules of law applicable to master and servant. Had the plaintiff been a stranger to the defendants, and had no claims upon them, except such as each citizen owes to the other, no liability of any kind would have attached to these defendants for the willful trespass of their servant. Not only would they be saved punishment, but compensation even. Now it being a case where no liability would attach, but for the contract, and the liability which does attach being for breach of contract, the rule in this case is not only punishing one for the act of another, but it is doing this in an action ex contractu, for this declaration must be construed to be such to meet the law of the opinion.

All consideration of the matter tends to show the fundamental error in holding an innocent party liable to punishment. In all these acts, done by the command of the principal (whether the authority appears by direct command or by fair implication from the proceedings of the party charged), there is propriety in punishing if the act be wrong and an infraction of the moral code; but in those cases where the act is unauthorized, and the principal is in nowise connected with the animus of the actor, and becomes liable to compensate upon grounds other than that the act was done by his command, it appears to me that all punishment inflicted, or rather all suffering imposed under the name of punishment, is flagrant injustice; it is not punishment, for it has not its necessary antecedent, wrong: both reason and authority are opposed to it, and no case can be found, where the question has been presented and discussed, in which such doctrines are not denounced as unsound and unjust. * * *

LAKE SHORE & M. S. RY. CO. v. PRENTICE.

(Supreme Court of the United States, 1893. 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.)

On October 12, 1886, the plaintiff, his wife, and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk, in Ohio, to Chicago, in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them

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to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employé of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff, and rudely searched him for weapons in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence of the passengers and others, ordered him to be taken to the station house, and he was forcibly taken there, and detained until the conductor arrived; and, knowing that the plaintiff had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which he gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

GRAY, J.[10] * * * The single question presented for our decision, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger. * * *

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the Chief Justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes v. Wood, Lofft, 1, 18, 19, 19 Howell, S. T. 1153, 1167. See, also, Huckle v. Money, 2 Wils. 205, 207; Sayer, Dam. 218, 221. The recovery

[10] Part of the opinion is omitted.

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of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559, 4 L. Ed. 456; Day v. Woodworth, 13 How. 363, 371, 14 L. Ed. 181; Railroad Co. v. Quigley, 21 How. 202, 213, 214, 16 L. Ed. 73. * * *

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456.

In that case, upon a libel in admiralty by the owner, master, supercargo, and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them; and, if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to

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repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559, 4 L. Ed. 456.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. Manufacturing Co. v. Fiske, 2 Mason, 119, 121, Fed. Cas. No. 1,681. In Keene v. Lizardi, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." * * *

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances. * * *

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. Railroad Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Howe v. Newmarch, 12 Allen (Mass.) 49; Ramsden v. Railroad Co., 104 Mass. 117, 6 Am. Rep. 200. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. * * * But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is the person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." Lothrop v. Adams, 133 Mass. 471, 480, 481, 43 Am. Rep. 528.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he

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did not participate. In Detroit Daily Post Co. v. McArthur, 16 Mich. 447, in Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760, and in Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines v. Schultz the Supreme Court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground—wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine respondeat superior." 50 N. J. Law, 484, 485, 14 Atl. 488. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and, where it has been held that he can, it is admitted to be an anomaly in the criminal law. * * *

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. * * *

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. * * *

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that, "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called 'smart money,'" if they were "satisfied that the conductor's conduct was illegal, wanton, and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression

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on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents. * * *

The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." Hagan v. Railroad Co., 3 R. I. 88, 91, 62 Am. Dec. 377. * * *

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It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern states. But of the three leading cases on that side of the question, Hopkins v. Railroad Co., 36 N. H. 9, 72 Am. Dec. 287, can hardly be reconciled with the later decisions in Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, and Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; and in Goddard v. Railway Co., 57 Me. 202, 228, 2 Am. Rep. 39, and Railway Co. v. Dunn, 19 Ohio St. 162, 590, 2 Am. Rep. 382, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedg. Dam. (8th Ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed. * * *[11]

CRAKER v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, 1875. 36 Wis. 657, 17 Am. Rep. 504.)

Action for insulting, violent, and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial. The plaintiff's testimony showed that she was about 20 years old and a school teacher. She missed a morning passenger train at Reedsburgh for Baraboo, and instead took an afternoon freight and

[11] See articles in 7 Harv. Law Rev. 45, and 5 Harv. Law Rev. 21.

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accommodation train under the guidance of the station agent, paying full fare and being given a seat in an office chair in the car. No other person was present when the conductor, after making overtures which were repulsed, suddenly and violently seized the plaintiff, put his arms about her, and repeatedly kissed her against her urgent protests. She continued in the car until she reached her destination. The conductor, on plaintiff's complaint, was subsequently arrested and fined, and was immediately discharged from the employment of the defendant company.

Plaintiff had a verdict for $1,000 damages, and defendant appeals.

RYAN, J.[12] * * * It is said in Railroad Co. v. Finney, 10 Wis. 388, that the plaintiff in such a case is not entitled to exemplary damages against the principal for the malicious act of the agent, without proof that the principal expressly authorized or confirmed it. Without now discussing what would or would not be competent or sufficient evidence of such authority or confirmation, we may say that we have, on very mature consideration, concluded that the rule in Railroad Co. v. Finney is the better and safer rule. We are aware that there is authority, and perhaps the greater weight of authority, for exemplary damages in such cases, without privity of the principal to the malice of the agent; and that reasons of public policy are strongly urged in support of such a rule. Goddard v. Railroad Co., 57 Me. 202, 2 Am. Rep. 39; Sanford v. Railroad Co., 23 N. Y. 343, 80 Am. Dec. 286; Railroad Co. v. Rodgers, 38 Ind. 116, 10 Am. Rep. 103; and other cases. But we adhere to what is said on that point in Railroad Co. v. Finney. We think that in justice there ought to be a difference in the rule of damages against principals for torts actually committed by agents, in cases where the principal is, and in cases where the principal is not, a party to the malice of the agent. In the former class of cases, the damages go upon the malice of the principal; malice common to principal and agent. In the latter class of cases, the recovery is for the act of the principal through the agent, in malice of the agent not shared by the principal; the principal being responsible for the act, but not for the motive of the agent. In the former class, the malice of the principal is actual; in the latter, it must at most be constructive. And we are inclined to think that the justice of the rule accords with public policy. Responsibility for compensatory damages will be a sufficient admonition to carrier corporations to select competent and trustworthy officers. And responsibility for exemplary damages, in cases of ratification, will be an admonition to prompt dismissal of offending officers, as their retention might well be held evidence of ratification. The interest of these corporations and of the public, in such matters, should be made alike as far as possible. And we hold the rule, as we have stated it, the justest and safest for both.

[12] Part of the opinion is omitted, and the statement of facts is rewritten.

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It was also said in Railroad Co. v. Finney that the action is in tort; but that, in cases not calling for exemplary damages, the rule of damages should be as in actions ex contractu, the actual loss sustained by reason of the misconduct of the conductor.

This was said arguendo, without attempt at close connection or exact statement; and it is not altogether easy to ascertain its precise meaning. If it mean, as it may, that in such cases the recovery against the principal for the tort committed by the agent is limited to the mere pecuniary loss, we cannot sanction it. Such a rule would be in conflict with all known rules of damages in actions of tort for personal wrongs; and would be almost equivalent to a license to officers of railroad trains and steamboats to insult and outrage passengers committed to their care for courtesy and protection; mischievous alike to the companies and the public. But if it mean, as it may and probably was intended, compensatory damages as in like actions for other personal torts, we affirm and adopt it as the rule of the court. We see no reason for distinguishing such actions from others of like character, in the rule of damages.

In Wilson v. Young, 31 Wis. 574, Lyon, J., inadvertently fell into some subtleties found in Mr. Sedgwick's excellent work, which appear to us all now to confuse compensatory and exemplary damages. The distinction was not in that case, and the passage in Sedgwick was cited and opproved, as such high authorities often are, without sufficient consideration. We all now concur in disapproving the distinction.

In giving the elements of damages, Mr. Sedgwick distinguishes between "the mental suffering produced by the act or omission in question, vexation, anxiety," which he holds to be ground for compensatory damages, and the "sense of wrong or insult, in the sufferer's breast, from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade or insult," which he holds to be ground for exemplary damages only. Sedgwick's Meas. Dam. 35.

Mr. Sedgwick himself says that the rule in favor of exemplary damages "blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender" (Id. 38); and, following him, this court held in the leading case of McWilliams v. Bragg, 3 Wis. 424, and has often since reaffirmed, that exemplary damages are "in addition to actual damages."

In actions of tort, as a rule, when the plaintiff's right to recover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages, in addition. The former are for the compensation of the plaintiff; the latter for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of plaintiff. And it is plain that there can not well be common ground for the two. The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice

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or no malice. If malice be established, then the interest of society comes in, to punish the defendant and deter others in like cases by adding exemplary to compensatory damages.

We need add no authority to Mr. Sedgwick's that, in actions for personal tort, mental suffering, vexation and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may indeed add to the sense of wrong; and equally, whether such intent be really there or not. But that goes to mental suffering and mental suffering to compensation. So it seems to us. But if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental suffering and his sense of wrong—so much for compensatory, and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If it be possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespective of all such inscrutable distinctions, is ground for compensatory damages in an action for the tort. * * *

The respondent appears to be of respectable rank in life and of sufficient culture to qualify her for teaching in public schools. In the painful trial of character and temper of the scene which culminated in the assault, in her action and demeanor following upon it, in the interview intruded upon her by the appellant, and in the embarrassment of her examination on the trial, she appears to have acted with great propriety, free from all exaggeration and affectation. She appears in the record to be a person who would feel such a wrong keenly. She was entitled to liberal damages for her terror and anxiety, her outraged feeling and insulted virtue, for all her mental humiliation and suffering. We cannot say that the damages are excessive. We might have been better satisfied with a verdict for less. But it is not for us, it was for the jury, to fix the amount. And they are not so large that we can say that they are unreasonable. Who can be found to say that such an amount would be in excess of compensation to his own or his neighbor's wife or sister or daughter? Hewlett v. Cruchley, 5 Taunt. 277. We cannot say that it is to the respondent.

The judgment of the court below is affirmed.

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KRUG v. PITASS et al.

(Court of Appeals of New York, 1900. 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317.)

This is an action to recover damages alleged to have been caused by the publication of an article concerning the plaintiff in a newspaper published in the Polish language at the city of Buffalo, known as "Polak W. Ameryce," or the "Pole in America." The defendant Pitass was the proprietor of said newspaper, the defendant Slisz the editor, and the article in question was a communication signed by the other defendant, Smeja. The jury rendered a verdict in favor of the plaintiff for $6,250, and, the judgment entered thereon having been affirmed in the appellate division by a divided vote, the defendants appealed to this court.

VANN, J.[18] The article in question, according to either translation, was libelous upon its face because it charged the plaintiff with a want of professional ability and integrity, and thus endangered the gain derived from his vocation. Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; Flood, Libel, 114. Referring to him as a physician, it called him a blockhead or fool, and appealed to all the Poles in Buffalo not to intrust themselves or their families to his professional care, when he so hated them that he would not help them if he could. * * * The article was actionable without proof of any damages, for the law imputes malice to the defendants, and presumes that damages were sustained by the plaintiff from the bare act of publication. * * *

While the plaintiff was thus entitled to recover on account of implied malice, his damages, without further proof, would be limited to such an amount as would fairly compensate him for the actual injury sustained. In order to recover punitive damages also, it was necessary for him to furnish evidence of express malice, or malice in fact, as distinguished from malice implied. Implied malice, in an action for libel, consists in publishing, without justifiable cause, that which is injurious to the character of another. It is a presumption drawn by the law from the simple fact of publication. Express malice consists in such a publication from ill will, or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do the unlawful act. It requires affirmative proof, beyond the act of publishing, indicating ill feeling, or such want of feeling as to impute a bad motive. It does not become an issue, when the article is libelous on its face, unless punitive damages are claimed. In order to establish express malice, the plaintiff was allowed to show, as against all the defendants, that several years prior to the publication the defendant Pitass had made remarks about him expressing contempt and ill will. There was no connection between these remarks and the other defend-

[18] Part of the opinion is omitted.

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ants, who neither heard them nor ever heard of them, so far as appears. It is undisputed that Pitass knew nothing about the article until some time after it had been published. He did not, directly or indirectly, cause or consent to its publication. He was liable only because he owned the newspaper, and was responsible for the acts of his agents in publishing it. His previous statements did not cause the publication, nor have any effect upon it. Between those statements and the fact of publication there was no connection, and no relation of cause and effect. They did not enter into, or become part of, or have any bearing upon, the wrong of which the plaintiff complains. As the article would have been published if they had not been made, they were immaterial, for they did not touch the wrongful act, and could not aggravate the damages.

Punitive damages, which are in excess of the actual loss, are allowed where the wrong is aggravated by evil motives in order to punish the wrongdoer for his misconduct, and furnish a wholesome example. As was said by the Supreme Court of the United States in an important case: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." Railroad Co. v. Quigley, 21 How. 202, 213, 16 L. Ed. 73. Did Pitass inflict the injury upon the plaintiff maliciously, when he knew nothing about it at the time it was done, and was only liable as owner of the newspaper? Did he, "in a spirit of mischief," conceive the act done by his agent without his knowledge? Could his malicious remarks, made in 1890, leap forward, and, without knowledge or action on his part, become blended with the act of his agent in 1894? Did his agent, the editor, conceive the act "in a spirit of mischief," which never entered his own mind, but existed at a remote period in the mind of another? Did the writer of the article act under the influence of words neither spoken in his presence nor communicated to him in any way? In an action for a tort there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done, and which had some influence in causing it to be done. * * * Moreover, the malice of one defendant cannot be imputed to another without connecting proof. "If two be sued, the motive of one must not be allowed to aggravate the damages against the other. Nor should the improper motive of an agent be matter of aggravation against his principal." Bigelow's Odgers, Libel, 296. * * *

Neither the author nor editor was a party to the malice of the publisher, and his malice did no harm, because it had no effect upon the result. While he was responsible for their acts, they were not re-

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sponsible for his motives, of which they had no knowledge. He was not responsible for his motives in connection with their acts, because there was no connection. The malice proved in this case did not cause the conduct complained of. The one guilty of malice did not commit the wrong, except through an agent, who knew nothing about the malicious feelings of his principal. The principal was not liable for general malice, but only for such particular malice as was connected with the publication. The agent was not liable for the general malice of his principal, of which he knew nothing, and which had no connection with the wrong done. The writer of the article was not liable for the malice of another, of which he had never heard, and which had no influence upon the wrongful act. Yet the general malice of one out of three defendants, although it had no connection with the wrong, has, as it must be presumed, entered into the verdict of $6,250 against all, in violation of the rights of each.[14]

[14] See, also, Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366 (1884); Hendrickson v. Kingsbury, 21 Iowa, 379 (1866); Southern Kansas Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766 (1888); Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571 (1887); Austin v. Wilson, 4 Cush. (Mass.) 273, 50 Am. Dec. 766 (1849); Detroit Daily P. Co. v. McArthur, 16 Mich. 447 (1868); Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668 (1875); Lucas v. M. C. R. R., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517 (1893); Bass v. C. R. Co., 36 Wis. 463, 17 Am. Rep. 495 (1874); Brown v. Swineford, 44 Wis. 285, 28 Am. Rep. 582 (1878); Hansley v. J. & W. R. Co., 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600 (1895). And see, in particular, the exhaustive case of Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270 (1872).

Reed, J. in Sheik v. Hobson, 64 Iowa, 146, 19 N. W. 875 (1884):

"The action was originally brought against Henry Rush, but during its pendency he died, and defendant, Hobson, administrator of his estate, was substituted as defendant. The alleged slanderous words imputed to plaintiff a want of chastity. * * * The question raised by the assignment is whether exemplary or punitory damages may be awarded against the personal representative of a deceased wrongdoer. There is no doubt but, at common law, the remedy for injury such as plaintiff complains of determines upon the death of the wrongdoer. 1 Chit. Pl. 89. But under our statute (Code, § 2525) all causes of action survive, 'and may be brought, notwithstanding the death of the person entitled or liable to the same.' Plaintiff's position is that, under this section, the right is preserved to her to have damages of this character assessed on account of the wrongful and malicious act by which she has suffered, notwithstanding the death of the one who committed the act. But we think the position is not sound. It cannot be said, in any case—unless the right is created by statute—that the person who suffers from the wrongful or malicious acts of another, has the right to have vindictive damages assessed against the wrongdoer. Such damages are awarded as a punishment of the man who has wickedly or wantonly violated the rights of another, rather than for the compensation of the one who suffers from his wrongful act. It is true, they are awarded to the one who has been made to suffer, but not as a matter of right; for, while he is entitled, under the law, to such sum as will fully compensate him for the injury sustained, the question whether punitory damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury. Plaintiff had a right of action, on account of the slanderous words spoken by Rush, for such sum as would compensate her for the injury. This was her cause of action, and this is what was preserved to her by the statute at his death. But she had no personal interest in the question of his punishment. So far as he was concerned, the punitory power of the law ceased when he died. To allow exemplary damages now, would

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be to punish his legal and personal representatives for his wrongful acts; but the civil law never inflicts vicarious punishment. Our holding as to the object of assessing exemplary damages in any case is abundantly sustained by the authorities, both in this state and elsewhere."

Walker, J., in City of Chicago v. Langlass, 52 Ill. 256, 4 Am. Rep. 603 (1869):

"But, in fixing the compensation, the jury have no right to give vindictive or punitive damages against a municipal corporation. Against such a body they should only be compensatory, and not by way of punishment. This seems to us to be a very large verdict, in fact largely beyond a compensation for the loss and suffering and permanent injury. We must conclude that the jury have given exemplary damages, and that the case should be submitted to another jury."

Exemplary damages are not allowed for the breach of a contract (excepting in "breach of promise"). Richardson v. Railroad Co., 126 N. C. 100, 35 S. E. 235 (1900); N. & W. R. R. Co. v. Wysor, 82 Va. 250 (1886).

See, also, Watson v. Dilts, post, p. 453; Lytton v. Baird, post, p. 522; Lawrence v. Hagerman, post, p. 524; Chellis v. Chapman, post, p. 483; and the cases under the headings "Mental Suffering" and "Pecuniary Condition of Parties as Affecting Allowance of Damages."

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CHAPTER IV.

MITIGATION.

FRASER v. BERKELEY et al.

(Court of Exchequer, 1836. 7 Car. & P. 621.)

Assault. Plea—Not guilty.

It appeared that the defendant, the Hon. G. Berkeley, accompanied by his brother, the Hon. Craven Berkeley, went on the 3d of August, 1836, to the shop of the plaintiff, in Regent street; and that the Hon. G. Berkeley beat him with a heavy whip and his fists, the Hon. Craven Berkeley holding the shop door, and a third person whose name did not appear, keeping the persons in the street away from the door.

It was opened by Thesiger, for the defendant, that the Hon. G. Berkeley had published an historical novel called Berkeley Castle; and that on the 1st of August, 1836, the plaintiff had published, in a work called Frazer's Magazine, what purported to be a critique on the novel, but which was really a most malignant libel on Mr. G. Berkeley, and his mother, and other members of his family.

Erle, for the plaintiff. That critique is the subject of a cross-action, which now stands for trial in this court. It is therefore, I submit, not a matter of mitigation in this action. It is, if anything, a distinct wrong, for which Mr. Berkeley has sought a distinct remedy.

Lord ABINGER, C. B. A defendant certainly cannot put in a libel as a set-off against an assault. The rule is, that that which amounts to a justification must be pleaded, but any matter of palliation or mitigation may be given in evidence under the general issue, and I think its being the subject of another action makes no difference. Suppose foul words preceded a blow—would they be the less a provocation because they happened to be actionable? If this critique is the subject of another action, you will make good use of that in your reply.[1]

Lord ABINGER, C. B. (in summing up). The only question in this case is as to the amount of damages. Whatever is an answer to the action must be pleaded as a justification, but it has been held by my learned predecessors, that in actions for personal wrongs and injuries, a defendant who does not deny that the verdict must pass against him, may give evidence to shew that the plaintiff in some degree brought the thing upon himself, and in that view the libel was given in evidence by the defendant's counsel. (a) This libel appears to have been published either on the 31st of July or the 1st of August, and the assault is on the 3d of August. The law I think would be an unwise

[1] Argument of counsel at this point in the original report is here omitted.

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law, if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation: and the same rule is allowed to prevail even on trials for murder; but in those cases, if the blood has had time to cool before the fatal blood is struck, the party is guilty of murder—indeed, in the present case, if death had ensued, the present defendants could not have escaped that criminal charge. The provocation three days before would not have availed them for going deliberately three days after to take their vengeance. At the same time it appears to me to be severe to say, that you should not look at the cause which induced the assault. But still, even supposing the libel to be as atrocious as words can make it, you will have to consider, whether in a case of so severe a beating as the present, you would let the libel have any very serious effect on the amount of the damages. It has been said that the plaintiff was a publisher only, and that, although the publisher is liable for damages in an action, yet that the anger of the party libelled should be directed against the author, and not against the bookseller. If the bookseller refuse to disclose the name of the author, and keep himself as a shield over the libeller, he cannot complain if he is treated as the author; but I think that the bookseller certainly ought to be first asked to give up the author. If no other person had been present, it might have been supposed that Mr. Berkeley had asked the plaintiff for the author's name before he began to beat the plaintiff; but if that had been so, the third person who was present might have been called to prove it. It was proposed by the plaintiff's counsel to go into evidence to shew that the libel was founded in truth: I prevented that from being done, because it is in my judgment immaterial. A man may be provoked by what is true as well as by what is false. If a man called another a liar, and was knocked down, the plaintiff would not be allowed to prove on the trial of the assault that the defendant was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of shewing that the feelings of the party were excited, and a man is not stung the less by a libel because it happens to be true. It is said that a person who publishes a work, must expect to have his feelings hurt by criticism; but if a critic, in criticising a book, goes out of his way, and attacks the private character of the author, this cannot be justified, and the author may recover damages. This was I think laid down by Lord Ellenborough in the case of Carr v. Hood, 1 Camp. 353. Mr. Thesiger has put this matter as a sort of debtor and creditor account—that Mr. Fraser libelled Mr. Berkeley, and Mr. Berkeley beat him; and that on Mr. Fraser bringing his action for the assault, Mr. Berkeley brought his action for the libel. But, if you allow for the libel in diminution of damages in this action, Mr. Berkeley will still be entitled to recover damages for it in the cross-action; and as he has chosen his remedy for the libel by his action for damages, I think that he cannot fairly be allowed to take much advantage of it in mitigation of

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damages in the present action. I really think that this assault was carried to a very inconsiderate length, and that if an author is to go and give a beating to a publisher who has offended him, two or three blows with a horsewhip ought to be quite enough to satisfy his irritated feelings.[2]

AVERY v. RAY et al.

(Supreme Judicial Court of Massachusetts, 1804. 1 Mass. 12.)

This was an action of trespass against Alpheus Ray and another, brought by Horace Avery, an infant under the age of twenty-one years, who sued, by his father and guardian, Miles Avery, for an assault and battery alleged to have been committed by the defendants on the infant on the 14th of February, 1803. * * *

The counsel for the defendants did not deny the assault, &c., but offered to prove, in mitigation of damages, that the plaintiff had said, and caused a report to be circulated, that the sister of Ray, one of the defendants, had openly solicited him, the plaintiff, to have a carnal connection with her—that Ray, having heard that the plaintiff had propagated such a story, had called on him to know whether he had or had not—that the plaintiff, upon this application of Ray, refusing either to acknowledge or deny that he had, was informed by Ray, that he would chastise him for thus slandering his sister, and that he did afterwards chastise him—which was the assault and battery for which the plaintiff had brought his action. And they cited the case of Gold v. Allen, determined in this court in this county some years since; in which the court, as the counsel for the defendant contended, had permitted Allen to give in evidence, in mitigation of damages, a provocation, arising from the propagation of an infamous story respecting the defendant by the plaintiff.

The counsel for the plaintiff objected to the evidence now offered. They did not deny that in many instances it was permitted to give in evidence, by way of mitigation of damages, facts and circumstances which would not amount to a justification; but these facts and circumstances were always such as took place at the time and place of assault. In this case the counsel for the defendants did not pretend that any part of what they now offered to prove happened at the time and place of the present assault; indeed it appeared from the testimony of all the witnesses who had testified as to what then took place, that nothing of the kind was mentioned; and it had also been proved, by the plaintiff, that Ray had made use of art and address to get the plaintiff into the place where he with the other defendant had committed the assault.

[2] Matters of justification cannot be given in evidence in order to mitigate the damages. Speck v. Phillips, 5 Mees. & W. 279 (1839).

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THATCHER, J., was against admitting the evidence offered—it would be going further than he had ever known.

SEWALL, J., was also against admitting. Immediate provocations are admitted—but he had never known an instance where the court had gone further than that.

SEDGWICK, J., said he should be in favor of admitting evidence of provocation given, in mitigation of damages, upon a liberal scale; but to admit such evidence where the blood had had time to cool, would be extending the rule so as to render it impossible to say where the court should stop. In this case it appeared that the assault had been planned with considerable deliberation, and committed without any provocation given by the plaintiff at the time of the assault—he was therefore against admitting. * * *[a]

LEE v. WOOLSEY.

(Supreme Court of New York, 1822. 19 Johns. 319, 10 Am. Dec. 230.)

This was an action of trespass, and assault and battery, tried at the Jefferson circuit, on the 22d of June, 1821, before Mr. Justice Platt. The plaintiff was an attorney at law, at Sackett's Harbour, and the defendant a post captain in the navy of the United States, stationed at that place. The plaintiff proved that in July, 1820, the defendant met the plaintiff in the street, and said to him, "Did you write that scandalous and infamous letter for Conder, against me, to the Secretary of the Navy?" The plaintiff replied, "I did, but I did it as an attorney, and was paid for it." The defendant then said, "What insinuations did you throw out, yesterday, against me, when my team was passing with timber through the village?" The plaintiff said, "Not any." The defendant replied, "You lie, you scoundrel, you infamous puppy," and immediately drew a rawhide whip from under his coat, and beat the plaintiff on his back, shoulders, &c. The plaintiff was a slender, feeble man, and the defendant a man of great strength; and the plaintiff suffered great bodily injury from the number and severity of the blows which he received from the defendant. The defendant, in mitigation of damages, offered in evidence, a paper addressed to the Secretary of the Navy, dated February 1, 1820, without signature, and to prove that it had been published and circulated among the citizens of Sackett's Harbour, and that it came to the hands of the defendant, a few days previous to the time of the assault and battery, and that the paper was in the handwriting of the plaintiff. The defendant further offered to prove, that the day before the assault and battery took place, the defendant had made several scandalous insin-

[a] Part of the statement of facts and all of the original report of this case following the opinion of Sedgwick, J., is here omitted.

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uations against the defendant, as post captain in the navy, charging him with embezzling the public property, entrusted to his care; and that the defendant had been informed of those insinuations and charges, on the evening preceding the assault of the plaintiff. This evidence was objected to, and rejected by the judge. The defendant then offered to prove that the paper so offered in evidence, was the one referred to in the conversation between the plaintiff and the defendant, at the time of the assault, to show to what the conversation referred. This evidence was objected to, and rejected by the judge. The defendant then offered to prove that the denial of the plaintiff, that he made such insinuations and charges, was untrue; but the evidence was objected to, and overruled by the judge. The jury found a verdict for the plaintiff, for $500.

A motion was made to set aside the verdict, and for a new trial.

SPENCER, C. J.[4] delivered the opinion of the court. The evidence offered and overruled, could neither be admitted in mitigation of damages, nor as explanatory of the transaction. The only view in which the evidence could be admissible, would be for the purpose of showing, that the defendant, under the influence of excited and irritated passions, was impelled, by a sense of the injury done to him by the plaintiff, thus to redress himself. The law, in tenderness to human frailties, distinguishes between an act done deliberately, and an act proceeding from sudden heat.

If, upon a sudden quarrel, two persons fight, and the one kills the other, this is manslaughter only. So, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, the offense is a mitigated homicide; for there is no previous malice. But, in every case of homicide upon provocation, if there be a sufficient time, intervening the affront and the killing, for passion to subside, and reason to interpose, the offence becomes murder. In analogy to this principle, evidence in civil actions for assaults and batteries, in mitigation of damages, has been admitted, to show a provocation on the part of the party complaining of the injury. But, the provocation must be so recent, as to induce a fair presumption, that the violence done was committed during the continuance of the feelings and passions excited by it. On any other principle, the law would countenance the most revengeful feelings; and indirectly, also, an appeal by persons conceiving themselves injured, to force and violence. The case of Avery v. Ray, 1 Mass. 12, was decided on these principles. All the judges were opposed to the admission of evidence of a remote provocation, and confined the inquiry to an immediate antecedent one. If the defendant had been permitted to show what he offered in mitigation of damages, it would follow, that the plaintiff ought to have been allowed to show the truth of the statement contained in the letter to the Secre-

[4] Part of the opinion is omitted.

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tary of the Navy; and so, also, of the other charge; and, thus, an inquiry wholly different from the one on the record, would be gone into, diverting and distracting the attention of the jury. It appears to me, neither to comport with sound policy nor law, to allow an inquiry into antecedent facts, in such a case as this, unless they are fairly to be considered as part of one and the same transaction. A contrary course would greatly encourage breaches of the peace, personal recounters, and every species of brutal force, and would tend to uncivilize the community. * * *[5]

GRONAN v. KUKKUCK.

(Supreme Court of Iowa, 1882. 59 Iowa, 18, 12 N. W. 748.)

Action to recover damages sustained by reason of an assault and battery committed by defendants upon the plaintiff. There was a verdict and judgment for plaintiff. Defendants appeal.

BECK, J.† * * * The court directed the jury that no words used by plaintiff would justify the assault, but words of provocation used just before and at the time of the assault should be considered in mitigation of exemplary damages, and added to the instruction the following words: "But no words used by plaintiff to the defendants or either of them before the day of assault, or which came to their knowledge before that time, should be considered by you for any purpose." Provocation given at the time of the assault, or within a prior time so recent as to justify the presumption that the offense was committed under the influence of passion excited thereby, may be shown in mitigation of damages. But if time for reflection intervened after the provocation, it will not extenuate the violence. This is the settled rule of this state. Thrall v. Knapp, 17 Iowa, 468; Ireland v. Elliott, 5 Iowa, 478, 68 Am. Dec. 715. A provocation arising on a day prior to the assault cannot be shown in mitigation of damages, for the law presumes sufficient time intervened before the assault to allow the passions to subside and reason to regain control of the mind. * * * Judgment affirmed.

[5] See, also, Linford v. Lake, 3 Hurl. & N. 276 (1858); Bracegirdle v. Orford, 2 Maule & S. 79 (1813); Warwick v. Foulkes, 12 Mees. & W. 507 (1844); Matthews v. Terry, 10 Conn. 459 (1835); Richardson v. Hine, 42 Conn. 206 (1875); Rearick v. Wilcox, 81 Ill. 77 (1876); Brown v. Brooks, 3 Ind. 518 (1852); Currier v. Swan, 63 Me. 323 (1874); Corning v. Corning, 6 N. Y. 103 (1854); Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543 (1881).

†Part of the opinion is omitted.

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GOLDSMITH'S ADM'R v. JOY.

(Supreme Court of Vermont, 1889. 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923.)

Trespass for an assault and battery, committed on one Goldsmith, brought by Goldsmith's administrator against Moses Joy, Jr. Defendant did not deny that he made the assault. It appeared, however, that at the time, and just before, hot words had passed between the parties, and defendant claimed that he committed the wrong under the influence of the passion induced by the insulting and unjustifiable language of plaintiff's intestate, and that this fact should be considered by the jury in reduction both of the actual and exemplary damages. Defendant was the superintendent and general manager of the construction of a system of waterworks in the city of Bennington, and in that capacity had in his employ about 100 men, mostly or all foreigners. It was in reference to the treatment of these men by defendant that the intestate used the alleged insulting language. He was suffering from Bright's disease at the time of the affray, and subsequently died of it. It was claimed that his death was materially hastened by the assault.

TYLER, J.[6] The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that, no matter how great the provocation, the defendant was bound in any event to answer for these damages. It is a general and wholesome rule of law that whenever by an act which he could have avoided, and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured. The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery has undergone wide discussion. The English cases lay down the general rule that provocation may mitigate damages. The case of Fraser v. Berkeley, 7 Car. & P. 621, is often referred to, in which Lord Abinger held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; "that it would be an unwise law if it did not make allowance for human infirmities; and, if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation." Tindal, C. J., in Perkins v. Vaughan, 5 Scott, N. R. 881, said: "I think it will be found that the result of the cases is that the matter cannot be given in evidence where it amounts to a defense, but that, where it does not amount to a defense, it may be given in mitigation of damages." Linford v. Lake, 3 Hurl. & N. 275; 2 Add. Torts, § 1393, recognizes the same rule. In this country, 2 Greenl. Ev. § 93, states the rule that a provocation by the plaintiff may be thus

[6] Part of the opinion is omitted.

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shown, if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. * * *

It is also said in 2 Sedg. Dam. (7th Ed.) 521, note: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this that where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is practically mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure." In Burke v. Melvin, 45 Conn. 243, Park, C. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damage the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damage, while the damage in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In Bartram v. Stone, 31 Conn. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat," produced by the plaintiff's false accusation. See, also, Richardson v. Hine, 42 Conn. 206. In Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was whether he used unnecessary force. Danforth, J., said: "It still remains that the plaintiff provoked the trespass; was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, * * * and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them." In Robison v. Rupert, 23 Pa. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no ex-

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emplary damages, and the circumstances of mitigation must be applied to the actual damages." In Ireland v. Elliott, 5 Iowa, 478, 68 Am. Dec. 715, the court said: "The furthest that the law has gone, and the furthest that it can go, while attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages." In Thrall v. Knapp, 17 Iowa, 468, the court said: "The clear distinction is this: Contemporaneous provocations of words or acts are admissible, but previous provocations are not. And the test is whether 'the blood has had time to cool.' * * * The law affords a redress for every injury. If the plaintiffs slandered defendant's daughters, it would entirely accord with his natural feeling to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand, the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace, that, 'if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little diachylon, yet he shall have his action.' Per Lord Holt, Ashby v. White, 2 Ld. Raym. 955." The reasoning of the court seems to make against his rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In Morely v. Dunbar, 24 Wis. 183, Dixon, C. J., held "that, notwithstanding what was said in Birchard v. Booth, 4 Wis. 75, circumstances of provocation attending the transaction, or so recent as to constitute a part of the res gestæ, though not sufficient entirely to justify the act done, may constitute an excuse that may mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal." But in Wilson v. Young, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings; Dixon, C. J., however, adhering to the rule in Morely v. Dunbar that it might go to reduce all compensatory damages. But in Fenelon v. Butts, 53 Wis. 344, 10 N. W. 501, and in Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of punitory, but not of actual damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault. In Donnelly v. Harris, 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. Walker, C. J., in delivering the opinion of the Supreme Court, remarked: "Had this modification been limited to exemplary damages, it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to

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mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then to say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect would be to abrogate, in effect, one of the most firmly established rules of the law." * * *

The court said in Prentiss v. Shaw, 56 Me. 436, 96 Am. Dec. 475: "We understand that rule to be this: A party shall recover as a pecuniary recompense the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. * * * If the assault was illegal and unjustified, why is not the plaintiff in such case entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property must pay all the damages to such person or property, directly and actually resulting from the illegal act? * * * Where the trespass or injury is upon personal or real property, it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, * * * must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other mitigation of the damages claimed, but he holds the law to be that mitigant circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act. * * *

We find no error in the charge and the judgment is affirmed.[7]

[7] Dixon, C. J., in Morely v. Dunbar, 24 Wis. 183 (1869):

"Circumstances of provocation attending the transaction, or so recent as to constitute a part of the res gestæ, though not sufficient entirely to justify the act done, may constitute an excuse which will mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal. This seems to follow as the necessary and logical result of the rule which permits exemplary damages to be recovered. Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If malice in the defendant is to be punished by the imposition of additional damages, or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so onesided as to scrutinize the motives and punish one party to the transaction for his malicious conduct, and not to punish the other for the same thing; nor so unwise as not to make allowance for the infirmities of men, when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensation for damages occasioned by himself—a result which would be contrary to every principle of reason and justice."

That defendant's good motive may lessen the amount of damages to be as-

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SICKRA v. SMALL, et al.

(Supreme Judicial Court of Maine, 1895. 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.)

WHITEHOUSE, J.[8] This was an action of libel for defamatory matter, published in a newspaper, representing that the plaintiff and Mrs. Blake had "eloped," and were living together in adultery.

At the trial, evidence was offered by the defendant, and admitted by the court, subject to the plaintiff's right of exception, that the plaintiff's "general character" was bad in the community in which he lived.

1. It was not questioned by the plaintiff that, in actions for libel or slander, the character of the plaintiff may be in issue upon the question of damages; but it is contended that the inquiry should be restricted to the plaintiff's general reputation in respect to that trait of character involved in the defamatory charge. * * *

In this class of cases, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation, as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and, as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue. Stone v. Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; Leonard v. Allen, 11 Cush. (Mass.) 241; Eastland v. Caldwell, 2 Bibb (Ky.) 21, 4 Am. Dec. 668; Powers v. Cary, 64 Me. 9. * * *

In Stone v. Varney, supra, the libel imputed to the plaintiff "heartless cruelty toward his child," and it was held competent for the defendant to introduce evidence, in mitigation of damages, that "the general reputation of the plaintiff in the community, as a man of moral worth," was bad. After a careful examination of the authorities touching the question, the court say, in the opinion: "This review of the adjudicated cases, and particularly the decisions in this commonwealth and in the state of New York, seems necessarily to lead to the conclusion that evidence of general bad character is admissible in mitigation of damages. * * * It cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury. Lord Ellenborough, in 1 Maule & S. 286, says: 'Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.'"

sessed for the doing of a wrongful act, see Linford v. Lake, 3 Hurl. & N. 276 (1858); Wilson v. Hicks, 26 L. J. Exch. 242 (1857); Davis v. L. & N. W. Ry., 4 Jur. (N. S.) 1303 (1858); Tullie v. Corrie, 16 Law T. 796 (1867).
See article in 16 Harv. Law Rev. 591.

[8] Part of the opinion is omitted.

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In Leonard v. Allen, supra, the plaintiff was charged with maliciously burning a schoolhouse, and it was held that, in the introduction of evidence to impeach the character of the plaintiff, in mitigation of damages, the inquiries should relate either to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offense with which the defendant had charged him.

In the recent case of Clark v. Brown, 116 Mass. 505, the plaintiff was charged with larceny. The trial court admitted evidence that the plaintiff's reputation for honesty and integrity was bad, and excluded evidence that his reputation in respect to thieving was bad. But the full court held the exclusion of the latter evidence to be error, and reaffirmed the rule, laid down in Stone v. Varney and Leonard v. Allen, supra, that it was competent for the defendant to prove, in mitigation of damages, that the plaintiff's general reputation was bad, and that it was also bad in respect to the charges involved in the alleged slander.

In Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468, the defendant's right to inquire into the plaintiff's "general character as a virtuous and honest man, or otherwise," was brought directly in question; and it was determined that the defendant was "not confined to evidence of character founded upon matters of the same nature as that specified in the charge, but may give in evidence the general bad character of the plaintiff * * * in mitigation of damages, and for this inquiry the plaintiff must stand prepared."

In Eastland v. Caldwell, supra, the court say, in the opinion: "In the estimation of damages the jury must take into consideration the general character of the plaintiff. * * * In this case, the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts in issue; but we are of opinion he ought to have been permitted to inquire into his general moral character, without relation to any particular species of immorality; for a man who is habitually addicted to every vice, except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate data for the quantum of damages if they are permitted only to know the plaintiff's general character in relation to the facts put in issue."

With respect to the form of the inquiry, it is said to be an inflexible rule of law that the only admissible evidence of a man's character, or actual nature and disposition, is his general reputation in the community where he resides. Chamb. Best, Ev. 256, note. It would seem, therefore, that, in order to avoid eliciting an expression of the witness' opinion respecting the plaintiff's character, the appropriate form of interrogatory would be an inquiry calling directly for his knowledge of the plaintiff's general reputation in the community, either as

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a man of moral worth, without restriction, or in the particular relation covered by the libel or slander.

2. But the plaintiff also has exceptions to the following instruction in the charge of the presiding justice: "I am requested by the counsel for the defendant to instruct you that, if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged. I give you that instruction." * * *

The obvious objection to it is that the damages in an action of slander are to be "measured by the injury caused by the words spoken, and not by the moral culpability of the speaker." We have seen that the defendant is permitted to prove that the plaintiff's general reputation is bad, because this evidence has a legitimate tendency to show that the injury is small; but the evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages. Powers v. Cary, supra; Mapes v. Weeks, 4 Wend. (N. Y.) 659; Stone v. Varney, supra. A fortiori, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose. * * *[9]

[9] Long, J., in Newman v. Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447 (1889):

"The words charged to have been spoken were actionable per se, and, if the defendant was actuated by malice, and in a wanton manner intended to charge the plaintiff with being unchaste, then exemplary damages were recoverable. But if the defendant spoke the words in the heat of passion, provoked thereto by what plaintiff had said of his family, and which had been communicated to him as coming from the plaintiff herself, this would be evidence of the want of malice, and the jury should consider it in mitigation of damages."

McFarlane, J., in Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583 (1894):

"Exemplary damages may always be given in suits for slander, when the words are maliciously spoken; but whether such damages should be given, in any case, is a matter within the discretion of the jury. In order to show good faith, and want of malice, the defendant has the right to put in evidence all the circumstances under which the words were uttered; and, if such circumstances tend to rebut malice, such damages could only be awarded in case the words were maliciously spoken, but may, in themselves, be sufficient proof, if malice is implied therefrom. Plaintiff, by innuendo, charged that defendant, by the slanderous words used, intended to impute to him corruption in office. Defendant, by answer, and in mitigation of damages, admitted that the words spoken had respect solely to plaintiff's official conduct. Defendant offered, as was his right to do, evidence tending to prove the circumstances under which the objectionable words were used, in order to prove good faith, and want of malicious intent. As has been said, defendant, as an interested citizen, had the right to make reasonable comment and fair criticism upon plaintiff's official conduct, but he had no right to go beyond that, and slander him. It was, in view of all the circumstances, for the jury to say how far the evidence mitigated the malice, if at all, and to award the damages accordingly."

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SWIFT v. DICKERMAN.

(Supreme Court of Errors of Connecticut, 1863. 31 Conn. 285.)

SANFORD, J.[10] * * * No rule of law is better settled than that in actions of slander the defendant shall not be permitted to prove the truth of the words for the purpose of mitigating the damages. If the charge is true, that may be pleaded in justification, and must be so pleaded, or notice of justification must be given at the time of pleading, or it can not be proved upon the trial. 2 Selw. N. P. 1167; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; 2 Greenl. Ev. § 424.

The imputation contained in the words complained of in the first count of this declaration is, that the plaintiff, professing to be a physician, and practicing as such, was so ignorant and unskillful that most of his patients lost their lives by following his prescriptions; in the second count, that the plaintiff was destitute of good character as a man, and of skill, knowledge and experience as a physician; and in the third, that he had so little professional knowledge and skill that he was more likely to kill than to cure those who employed him. Want of professional knowledge and skill, then, is the gist of the imputation contained in the words complained of. The evidence offered, and admitted over defendant's objection, was of the facts and circumstances of the plaintiff's treatment of disease in some thirty cases specified in the notice, in all of which cases, as the defendant claimed, the plaintiff evinced professional ignorance and want of skill.

Had the defendant by a special plea or notice justified the speaking of the words complained of because they were true, the evidence under such plea or notice would have been admissible. But the truth of the defendant's charge was not pretended, and the notice was as unavailing as it was unnecessary. In this action facts which affect the amount of damages merely can never be specially pleaded, and may always be given in evidence under the general issue without notice. And neither plea nor notice will enable a defendant to introduce evidence which has no legal tendency to prove the issue under which he offers it. Williams v. Miner, 18 Conn. 464; Stow v. Converse, 4 Conn. 33; Andrews v. Vanduzer, 11 Johns. (N. Y.) 38; 2 Greenl. Ev. § 425. Upon this trial the defendant made no attempt to justify the speaking of the words, but he contended that the plaintiff's damages should be reduced because in certain specified cases he had treated his patients in such a way as to evince his want of professional knowledge and skill.

Now damages in this kind of action are denied altogether, and the suit is barred, when the words though spoken were not defamatory, or were true, or were spoken under circumstances which justified their ut-

[10] Part of the opinion is omitted.

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terance. And damages are to be reduced where the plaintiff's reputation in regard to the offense or misconduct imputed by the words was in fact impaired before the words were uttered, because an impaired reputation is less valuable than a sound one, and a smaller amount of injury can be done to it. And they are to be reduced also, where the circumstances under which the words were uttered were such as to show that, although false, their utterance was not in fact malicious.

This evidence was not offered to defeat the suit, and we think it was inadmissible to reduce the damages. It was not admissible for the purpose of showing that the plaintiff's professional reputation was impaired before the words were spoken. Reputation, or as it is sometimes called, character, is a fact to be proved by the testimony of witnesses who know it, not by the proof of specific instances of misconduct which might or might not have injuriously affected it. Every man is bound, and is supposed to be always prepared to answer and repel imputations upon his general reputation whenever that reputation is by the rules of law assailable in court, but not to answer specific charges of misconduct unconnected with the subject-matter of the suit. In actions for defamation damages should be given in proportion to the value of the plaintiff's character at the time it was assailed by the defendant, and the degree of malice which actuated the assailant. But the misconduct of the plaintiff in particular instances has no necessary connection with his reputation. It is matter of common observation that physicians of the highest professional attainments and reputation sometimes err in their treatment of particular cases of disease; and probably the practice of almost every physician affords examples of erroneous and injurious treatment; but the loss of professional reputation is by no means necessarily involved in such mistakes. It may not be known or believed that they have in fact occurred, and so their occurrence may have produced no effect upon the public mind. There is then no necessary connection between mistakes in medical practice and loss of professional reputation, and therefore the loss of reputation can not be legitimately inferred from the proof of such mistakes.

The offered evidence was inadmissible also for the purpose of showing that the defendant was not actuated by malicious motives in making the imputation. We assent to the doctrine sanctioned by this court in Williams v. Miner, "that a defendant should not be deprived of the benefit of mitigating circumstances for no better reason than that they conduce to prove the truth of the charge while they fall short of it." The defendant may show in evidence by way of excuse anything short of a justification, which does not necessarily imply the truth of the charge, or necessarily tend to prove it true, but which repels the presumption of malice. But the only tendency of the evidence offered in the case at bar, was to prove the truth of the charge. * * *

Judgment for plaintiff affirmed.

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BURNETT v. SIMPKINS.

(Supreme Court of Illinois, 1860. 24 Ill. 264.)

This was an action of assumpsit, brought to the Knox circuit court by defendant in error, against plaintiff in error, for a breach of marriage contract. * * * A portion of the defendant's proof went to show the general bad character, immorality, and lewdness of plaintiff, all of which was withdrawn from the consideration of the jury by the court.[11]

WALKER, J.[12] In actions for libel, slander, and the breach of marriage contract, the jury may, in assessing the damages, take into consideration the injury sustained by the plaintiff as well to the reputation and standing in society, as the situation of the parties. And no rule appeals more strongly to our sense of justice, or is more consonant to the principles of right, than that an injury to the reputation of the good and virtuous, should be compensated in damages. And the proposition is too plain to be denied by any, that an injury to the character of a virtuous and good woman, is greater than to that of one who is depraved and abandoned. To place the character of the two upon the same level, and to hold that an injury to the one is no greater wrong than to the other, is to confound all distinction between virtue and vice, the good and the depraved. That there ever has been and will continue to be a difference, is as obvious as that virtue is preferable to vice.

No court has ever announced as a rule, in the assessment of damages, that a slander to the character of the low and depraved, is to be compensated by the same measure as if it had been inflicted upon the character of the good and upright. Such a rule can never prevail while any distinction is made in character. When all distinction is lost, then, and not till then, will the same rule, in measuring the damages, be applied. In assessing damages for the breach of a marriage contract, the doctrine is well settled, that the jury may take into consideration all the injury sustained, whether it be from anguish of mind, from blighted affections, or disappointed hopes, as well as injury to character, immediately resulting from the breach of the promise. And this court has repeatedly held, that evidence of a seduction, the consequence of the marriage contract, may be given in aggravation of the damages. It will not be insisted that the breach of promise will occasion the same anguish of mind, or produce the same injury to the reputation of a prostitute, as to a pure and virtuous woman. Nor can a seduction result in the same injury to her character, as to that of a virtuous female. And these are proper considerations for the jury in estimating damages. If injury to the feelings and character of the party injured could not be considered by the jury, there would be

[11] The statement of facts is abridged from that found in the official report.
[12] Part of the opinion is omitted.

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more plausibility in the position that evidence of bad character of the plaintiff could not be received in mitigation. But if the plaintiff may go outside of a mere pecuniary loss, and enhance the damages by showing mental suffering, loss of position and character, it would seem to follow that the defendant may show in mitigation the want of character, or one that is not above suspicion.

If the previous bad character for virtue were not known to defendant when he entered into the engagement, and it came to his knowledge subsequently, it would absolve him from its performance, upon the grounds that it was a fraud upon the contract. But while this is true, if the want of virtue on the part of the plaintiff was known to defendant at the time, it forms no grounds of defense to the action, but it may be shown in mitigation, for the reason that its breach does not result in the same injury as if the character had been good. And we regard this as especially true, when the plaintiff seeks to enhance the damages by giving evidence of a seduction resulting from the contract. If she may thus aggravate the damages, the defendant must be permitted to show that she was, previous to the engagement, and without any act of his, wanting in virtue, in order to avoid such increased damages. If, at the time of making the contract, she was virtuous, and it was by the act of the defendant she ceased to be so, then he cannot be heard to prove the want of virtue in mitigation. But if she has previously, or during the continuance of the engagement, prostituted her person to another, and the defendant has, without a knowledge of the fact, entered into the contract, or continued it, he may show the fact in mitigation. The evidence of a want of virtue on the part of defendant in error in this case, was therefore admissible in mitigation of damages, although the plaintiff in error may have been informed of the fact at the time he entered into the contract, and it should not have been excluded from the jury. And the court erred in not giving defendant's fourteenth instruction, which announces this rule. * * *[13]

[13] A subsequent offer by defendant, after breach, to marry plaintiff, is not admissible in mitigation. White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100 (1874).

The subject of mitigation in slander and libel will be found much more fully treated in Irvine's Cases on Evidence.

Clark, J., in Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 33, 12 L. R. A. 268, 23 Am. St. Rep. 192 (1891), said:

"There was evidence in this case that the plaintiff, Henry C. Bunting, at the time of the trial, was suffering from what is known as 'Bright's disease of the kidneys.' * * * The court very properly, therefore, instructed the jury that there was proof of this fact in the case; that it was a dangerous disease; and that they should take this into consideration in determining Mr. Bunting's expectancy of life and the loss of his earning power. Nor was there any evidence to justify the jury in finding that this disease was caused by the personal injuries received in the collision. The judgment is therefore affirmed."

But see L., N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60 (1889).

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PALMER v. CROOK.

(Supreme Judicial Court of Massachusetts, 1856. 7 Gray, 418.)

Action of tort for seducing the plaintiff's wife, and alienating her affections from him. At the trial the defendant introduced the depositions of the wife's father and mother, tending to prove that the plaintiff had cruelly treated his wife, and neglected to provide for her, in consequence of which she had returned to her father's house before the time of the alleged seduction. The court excluded certain parts of the depositions including those parts which tended to show that the wife of the plaintiff complained of his ill treatment prior to the alleged criminal intercourse with the defendant.

BIGELOW, J.[14] * * * These parts were competent, and should have been admitted. In actions for criminal conversation, one of the principal grounds on which the husband is allowed to recover damages is, that by the wrongful act of the defendant he has been deprived of the confidence and affection of the wife. If the defendant invaded domestic peace, destroyed conjugal felicity, and by his solicitations alienated and seduced the wife's affections from a kind and tender husband, he inflicted a much more grievous wrong, and incurred a far heavier penalty in damages, than he would have done if love and harmony and affectionate intercourse had been previously impaired or lost, through the misconduct and cruel treatment of the husband.

The state of the wife's mind and feelings towards the husband before the alleged infidelity is therefore directly in issue, as bearing on the question of damages; and it may be shown, in the usual mode in which proof of such a fact is made in courts of law, by evidence of declarations and statements of the wife, indicating the condition of her affections towards her husband during their cohabitation and prior to the alleged seduction. * * *

HOTCHKISS v. OLIPHANT.

(Supreme Court of New York, 1842. 2 Hill, 510.)

NELSON, C. J.[14] * * * The counsel for the defendant offered in evidence, by way of mitigation, an article subsequently published in his paper, commenting somewhat at large upon the same general subject to which the libel related; and also containing, what purported to be a letter from the plaintiff's attorneys, calling for a retraction of the charges before made. The judge rejected the offer, at the same time observing, however, that he would admit the evidence, if the counsel

[14] Part of the opinion is omitted.

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for the defendant would prove that the letter had been actually addressed to the defendant by the attorneys.

If this article had contained a full and unqualified withdrawal of the charges in the libel, unaccompanied with other offensive or libelous matter, and had been intended and published as some slight atonement for the injury done, I think it would have been admissible for the purpose for which it was offered. It would have afforded proof not only of a disposition to repair the wrong inflicted, but of actual reparation to some extent. The defendant should have the benefit of a "locus penitentiæ," when evidenced by an honest endeavor and in a way to make atonement to as great an extent as is within his power. But the article in question contained no recantation; and besides, it was filled with additional injuries and calumnious imputations upon the plaintiff's character. If the defendant had become satisfied that the charges which he had unwittingly copied were unfounded, common honesty and a decent respect for the rights of the injured party called for an unqualified withdrawal. Hesitation, lurking insinuation, an attempted perversion of the plain import of the language used in the libelous article, or a substitution of one calumny for another, only aggravate the original offence and show a consciousness of the wrong done without the manliness or magnanimity to repair it. * * *

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PART V.

COMPENSATORY DAMAGES.

CHAPTER I.

GENERAL LIMITATIONS.

SECTION 1.—DIRECT AND CONSEQUENTIAL DAMAGES.

I. In Tort.

MILWAUKEE & ST. P. RY. CO. v. KELLOGG.

(Supreme Court of United States, 1876. 94 U. S. 469, 24 L. Ed. 256.)

This action was brought to recover compensation for the destruction by fire of a sawmill and a quantity of lumber belonging to the plaintiff, and situated on the bank of the Mississippi river. Through the negligence of the defendants, their steamboat, the Jennie Brown, caught fire. This was communicated to defendant's elevator, and from thence to the plaintiff's mill and lumber, situated 538 feet and 388 feet distant from the elevator, respectively. An unusually strong wind was blowing. Judgment for plaintiff. Defendants appeal.

Strong, J.[1] * * * The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the Jennie Brown set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and thirty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury, to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the

[1] Part of the opinion is omitted, and the statement of facts is rewritten.

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elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of Ryan v. New York Central Railroad Co., 35 N. Y. 210, 91 Am. Dec. 49, and Pennsylvania Railroad Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. Webb v. Rome, Watertown, & Ogdensburg Railroad Co., 49 N. Y. 420, 10 Am. Rep. 389, and Pennsylvania Railroad Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100. And certainly they are in conflict with numerous other decided cases. Kellogg v. Chicago & Northwestern Railroad Co., 26 Wis. 224, 7 Am. Rep. 69; Perley v. The Eastern Railroad Co., 98 Mass. 414, 96 Am. Dec. 645; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Fent v. Toledo, Peoria, & Warsaw Railroad Co., 59 Ill. 349, 14 Am. Rep. 13.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be removed by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. Scott c. Shepherd, 2 W. Bl. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the sawmill and the piles of lumber. Most of these circum-

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stances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet, in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and the lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independ-

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ent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.[2]

WOOD v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1896. 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728.)

DEAN, J.[3] * * * On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way train, due at Holmesburg at 5 minutes after 6 in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least 150 yards to the eastward of the crossing the railroad is straight, and then curves to the right. About 6 o'clock an express train coming from the east upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from 50 to 60 miles an hour. Upon this state of facts, the trial judge entered a nonsuit. * * *

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority

[2] Compare Haverly v. State Line & S. R. Co., 135 Pa. 50, 19 Atl. 1013, 20 Am. St. Rep. 848 (1890).

Probably the most generally known discussion of the distinction between direct and consequential results is to be found in the celebrated "squib case." Scott v. Shepherd, 2 W. Bl. 892 (1772). And see, reviewing the earlier cases, Leame v. Bray, 3 East, 593 (1803), and Cowell v. Laming, 1 Camp. 497 (1808). This subject involves the same considerations as the distinctions between trespass and trespass on the case. For the earliest discussions of the larger subject, the student is referred to Hepburn's Cases on Torts and to Whittier's Cases on Pleading.

[3] Part of the opinion is omitted.

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of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in Hoag v. Railroad Co., 85 Pa. 293, 27 Am. Rep. 653, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer as likely to flow from his act?" * * *

The rule quoted in Hoag v. Railroad Co., supra, is, in substance, the conclusion of Lord Bacon, and the one given in Brown's Legal Maxims. It is not only the well-settled rule of this state, but is, generally, that of the United States. Prof. Jaggard, in his valuable work on Torts, after a reference to very many of the cases decided in a large number of the states, among them Hoag v. Railroad Co., comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Jag. Torts, c. 5. Judge Cooley states the rule thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent." Cooley, Torts, 69. This, also, is in substance the rule of Hoag v. Railroad Co. All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in Hoag v. Railroad Co. Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences, which must be foreseen of this act? We answer in this and all like cases: from common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death, or serious injury. Therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregardful of consequences, cross, and are injured, killed, or barely escape. But this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows from his own experience and that of others in like employment that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives

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and limbs of the public using the crossing. He knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning. But does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in Hoag v. Railroad Co., be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in Railroad Co. v. Trich, 117 Pa. 399, 11 Atl. 627, 2 Am. St. Rep. 672: "Responsibility does not extend to every consequence which may possibly result from negligence." What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it. * * *

GILMAN v. NOYES.

(Supreme Court of New Hampshire, 1876. 57 N. H. 627.)

Case for carelessly leaving the bars down of plaintiff's pasture whereby his cattle and sheep escaped. The plaintiff expended time and money in hunting for the cattle, and the sheep were lost. The evidence tended to show that the sheep were destroyed by bears after escaping from the pasture. The court, inter alia, instructed the jury that, if the sheep escaped in consequence of the bars being left down, and would not have been killed but for the act of the defendant, the latter was liable. From a verdict for the plaintiff, the defendant appeals.

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SMITH, J.[4] * * * In this case the evidence tended to show the intervention of a new cause of the destruction of the plaintiff's sheep after their escape from his pasture, which could not reasonably have been anticipated. The only practicable rule to be drawn from all the cases, for determining this case, it seems to me, is, to inquire whether the loss of the plaintiff's sheep by bears was an event which might reasonably have been anticipated from the defendant's act in leaving his bars down, under all the circumstances of this case. If it was a natural consequence which any reasonable person could have anticipated, then the defendant's act was the proximate cause. If, on the other hand, the bears were a new agency, which could not reasonably have been anticipated, the loss of the sheep must be set down as a remote consequence, for which the defendant is not responsible.

The jury were instructed that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for this act of the defendant, he was liable. Under these instructions, the jury could not inquire whether the destruction of the sheep by the bears was an event which might reasonably have been anticipated from the leaving of the bars down, and for this reason I agree that the verdict must be set aside.

LADD, J. I am unable to free my mind from considerable doubt as to the correctness of the ground upon which my Brethren put the decision of this case.

The defendant requested the court to charge that if the jury found that the sheep were killed by bears after their escape, the damages would be too remote. This the court declined to do, but did instruct them that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for that act of the defendant, he was liable for their value. Both the request and the instruction went upon the ground that the question of remoteness—all the facts being found—was for the court, and not for the jury. Upon that distinct and simple question the defendant claimed one way and the court held the other. I understand it to be the opinion of my Brethren that neither was right; that the question of remoteness was for the jury, and that the court erred in not so treating it. Whether it is for the jury or the court, every one who has considered the matter will agree that it is almost always a troublesome question, and often one attended with profound intrinsic difficulty.

The verdict here settles (1) that the bars were left down by the defendant; (2) that the sheep escaped in consequence thereof; (3) that they would not otherwise have been killed. Was the defendant's act the proximate cause of the damage? Was it the cause in such sense that the law will take cognizance of it by holding the defendant liable to make reparation in damages? And is that question one for the

[4] Only parts of the opinions of Smith and Ladd, JJ., are here given; the rest of the report of the case being omitted, and the statement of facts is rewritten.

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court, or for the jury, to decide? The sheep would not have been killed, the jury say, but for that act: does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything which happens would have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent. The maxim of the schoolmen, "Causa causantis, causa est causati," may be true, but it obviously leads into a labyrinth of refined and bewildering speculation whither the law cannot attempt to follow. This case furnishes an illustration. The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at any indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the bee-hives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring cornfield, and so brought to the place of the fatal encounter just at that particular point of time.

Obviously, the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went in unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for the speculation equally profound and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did though the bars were down, or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can

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be adopted in drawing the uncertain line between consequences that are actionable and those which are not.

Some aid in dealing with this question of remoteness in particular cases is furnished by Lord Bacon's rule, "In jure, causa proxima, non remota spectatur," and other formulas of a like description, because they suggest some boundaries, though indistinct, to a wilderness that otherwise, and perhaps in the nature of things, has no limit.

Where damages are claimed for the breach of a contract, it has been said that the nearest application of anything like a fixed rule is, that the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Cockburn, C. J., in Hobbs v. London & S. W. Railway Co., L. R. 10 Q. B. 117. In tort, they must be the legal and natural consequence of the wrongful act. Sedgwick on Damages, 82, and cases cited; 2 Gr. Ev. §§ 252–256, and cases cited. But an examination of the numerous cases where this matter has been carefully and learnedly discussed, shows that the intrinsic difficulties of the subject are not removed, although they may be aided, by the application of such rules. Whether the extent, degree, and intimacy of causation are sufficient to bring the injurious consequences of an act within the circle of those wrongs for which the law supplies a remedy, still remains the great question to be determined in each case upon its individual facts. That the subject is one beset with difficulties is conspicuously shown by the great number of cases from Scott v. Shepherd, 2 Wm. Bl. 892 (where Sir William Blackstone was unable to agree with the court), down to the present time, in which judges of equal learning and ability have differed as to the application of rules by which all admit they are to be governed. * * *

The question is whether courts can relieve themselves from troublesome inquiries of this description by handing them over to the jury for determination. I am not now prepared to admit that they can. In this case, as we have seen, the verdict settles that the defendant left the bars down, that the sheep escaped in consequence, and that they would not have been killed but for their escape. Clearly, no disputed fact is left unsettled. The only question left open is, whether the damage is within or without the line drawn by the law as the boundary between those injuries for which the law compels compensation to be made and those for which it does not. It is the law that furnishes remedies. Whether any act or default amounts to a legal wrong and injury for which compensation may be recovered depends upon the law, and is to be determined by an application of rules either furnished by the Legislature in the form of statutes, or found existing in the common law. If the law takes no cognizance of an act, furnishes no remedy for its injurious results, then there is no remedy; and though it may be wrong in a sentimental or moral point of view, the sufferer can have no recompense. And I cannot see what difference it makes in this respect whether the rule is established by a statute, or comes from the

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common law. That A. can recover damages against B. for an assault and battery committed upon him by the latter, depends just as much upon a rule of positive law, in this state, as that he may recover against C., who has unlawfully furnished liquor to B., who, in a state of intoxication produced by the liquor, makes the assault. One is a provision of the common law; the other, of a statute. When the court of South Carolina held that where a person, against the law, furnished a slave with intoxicating liquor, by which he became drunk and lay out all night, and died in consequence, the owner of the slave could recover his value against the person who furnished the liquor (Berkley v. Harrison, cited in Sedgw. on Dam. 89), they were declaring and applying a rule of law as much as though that remedy had been given by a statute similar to ours. So it is in the great mass of cases with which the books are filled: the question as to remoteness is determined by the court, and the rule administered as a rule of law. See cases cited in Sedgw. on Dam. c. 3, passim. A large number of English and American cases might be added, were any citation of authorities necessary. * * *

McDONALD v. SNELLING.

(Supreme Judicial Court of Massachusetts, 1867. 14 Allen, 290, 92 Am. Dec. 768.)

FOSTER, J.[5] * * * Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if according to the usual experience of mankind the result was to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of. * * *

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the injurious

[5] Part of the opinion is omitted.

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consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues. * * *

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont street round a corner, near by, into Eliot street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

These views are fortified by numerous decisions, to a few of which it may be expedient to refer. It was recently held by this court that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. Barnes v. Chapin, 4 Allen, 444, 81 Am. Dec. 710. We cannot distinguish between the different ways of letting a horse loose upon the street; whether by leaving him there untied, or leaving a gate open, or, as in the present case, by driving against him, and thus causing him to run away. In Powell v. Deveney, 3 Cush. 300, 50 Am. Dec. 738, the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff who was walking by, and broke her leg. For this injury she

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was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. * * *

GRIGGS v. FLECKENSTEIN.

(Supreme Court of Minnesota, 1869. 14 Minn. 81 [Gil. 62], 100 Am. Dec. 199.)

Defendant left his team unhitched in the principal street of Faribault. The horses became frightened and ran along the street. A crowd of persons came out into the street and hallooed and waved their hats for the purpose of stopping the horses, which caused them to swerve from their course and drove them across the street, so that they struck the team of one Matthews standing properly hitched. Matthews' team broke loose and ran across the street against a horse and sleigh belonging to the plaintiff, breaking the plaintiff's sleigh and injuring his horse so that he afterward died.

McMILLAN, J.[6] * * * There is no controversy about the fact that the running away of the defendant's team was attributable to and occurred at first though the negligence of the defendant. The team had not stopped, or been at all restrained in their flight, at the time of the appearance of the persons or crowd in the street. The attempt to stop the team was not successful, but, as we have seen, may have swerved the horses from the direct course in which they were going and occasioned the collision with the Matthews team hitched at the side of the street. The attempt to stop the team in their course through the street was certainly proper, and would ordinarily be expected. Under such circumstances there is nothing in the testimony which tends to show that there was anything wrongful, careless, or improper in the means resorted to by these persons to accomplish this purpose; they are, therefore, entirely innocent and free from blame. If they contributed to the injury in any degree, they were innocent agents in the matter, and as their interference in this manner was proper, and was such an interference as would be embraced in the ordinary results of such an occurrence as this runaway, it would in nowise excuse the defendant, or relieve him from the injury resulting from the runaway which occurred through his negligence. The testimony all shows that the defendant's team did not stop, from the time it started to run away at the post-office, until after it came in collision with and started the Matthews team; that the interposition of the crowd or persons in the street was for the purpose of stopping the runaway team, and before its collision; nor is there any evidence to show that the team would have stopped if the crowd had not interposed.

[6] Part of the opinion is omitted, and the statement of facts is rewritten.

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It is evident, therefore, that the running away, from the starting of defendant's team till the collision, was a single occurrence, and whatever influence the interposition of the crowd had in occasioning the collision, it was not the sole cause of it; that the running away which occurred through the defendant's negligence was, in part at least, the occasion of it. Both causes, therefore, in the most favorable view for the defendant, must have contributed to it; and as the defendant is responsible through his negligence for one of the agencies through which the injury occurred, under the rule we have stated he is liable, although without the agency of both causes the accident would not have transpired. Matthews' team, it appears, was hitched to a post in front of McGuery's store, and there is nothing tending to show any negligence or carelessness on the part of the owner of the team.

The immediate cause of the starting of Matthews' team was the collision of the defendant's team with it, and the injury of the plaintiff's horse was caused directly by Matthews' team striking it. This brings the case within the rule that the injury must be the natural and proximate result of the act complained of. The collision with Matthews' team was the natural but not necessary consequence of the running away of defendant's team in the street. All the consequences which actually resulted in this case from the running away of defendant's team might, we think, reasonably have been expected to occur by the running away of any team, under similar circumstances, in the principal business street of a town, and the running away of the defendant's team was the efficient cause of the injury to plaintiff's horse, because it put in operation the force which was the immediate and direct cause of the injury. 2 Greenl. Ev. §§ 256, 268, 268a; 3 Parsons, Cont. 179–80.

For these reasons the first and second requests submitted by the plaintiff, which were refused, should have been given to the jury; and the first request submitted by the defendant, as explained and modified by the court, together with the third request submitted by the defendant, and given in charge to the jury, should have been refused.

It is also a well-settled rule that in an action for injury to person or property the plaintiff cannot recover if he contributed to the injury by his own culpable negligence, or if, by the exercise of ordinary care, he could have avoided the injury. 1 Chit. Pl. 127, and authorities cited.

The question of the plaintiff's negligence in this case was one of fact, to be determined by the jury, under the instructions of the court as to what constitutes negligence. St. Paul v. Kuby, 8 Minn. 171 (Gil. 125); Johnson v. Winona & St. P. R. Co. 11 Minn. 307 (Gil. 204), 83 Am. Dec. 83. The degree of care required of the plaintiff, or those in charge of his horse, at the time of the injury, is that which would be exercised by a person of ordinary care and prudence under like circumstances. It cannot be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a

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horse unhitched must depend upon the disposition of the horse; whether he was under the observation and control of some person all the time, and many other circumstances; and is a question to be determined by the jury from the facts of each case. Lynch v. Nurdin, 1 Q. B. 29; 1 Hill. Torts, 154; Park v. O'Brien, 23 Conn. 339.

It was therefore proper for the plaintiff to show, by his testimony, that his horse was trustworthy to stand unhitched in the street, and the question put to the witness for that purpose should have been permitted. It was also erroneous to charge the jury that "the leaving of the plaintiff's horse in the street unhitched was an act of negligence."

* * *

RING v. CITY OF COHOES.

(Court of Appeals of New York, 1879. 77 N. Y. 83, 33 Am. Rep. 574.)

EARL, J.[7] * * * The plaintiff was driving a blind horse, harnessed to a sleigh, upon one of the streets of the city. The street was thirty feet wide between the curbs. At the place of the accident, on the west side of the street, there was a heap of ashes about twenty feet long, three feet high and extending from the westerly curb into the street about eleven feet leaving a roadway between the heap of ashes and the easterly curb of about nineteen feet. At the same time, a loaded wagon was coming southerly, next to the heap of ashes, leaving a roadway between that and the easterly curb about twelve feet wide. Plaintiff's horse, coming from the south, became frightened and commenced to run; the plaintiff was unable to restrain him or to guide or direct him with any precision; and after running about five seconds, he ran so near to a hydrant, on the easterly side of the street, opposite the wagon going south, as to strike the nozzle of the same with the cross-bar of the sleigh, and plaintiff was thrown against the hydrant, and sustained the injury complained of in this action. The referee was authorized to find, upon the evidence, that the plaintiff was free from fault; and that the city was in fault for permitting the street to be encumbered with the heap of ashes. His finding upon defendant's negligence is as follows: "The defendant was guilty of negligence in allowing and permitting said pile of ashes and cinders to accumulate and remain in said street, and in erecting and maintaining said hydrant so that the same and the nozzle thereof projected into the portion of the street between the two curbs, and that such negligence contributed to the accident and injury to the plaintiff above described; that by reason of such negligence of the defendant and of such accident and injury to the plaintiff, the plaintiff has suffered damage," etc.

It will be observed that the referee found the defendant negligent, both as to the heap of ashes and the hydrant, and that such negligence

[7] Part of the opinion is omitted.

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contributed to the accident; and he finds against the defendant on account thereof. He based his judgment upon two defects in the street; and how much he was influenced in reaching his conclusion by either, we cannot tell. He certainly erred in finding that the defendant was negligent as to the hydrant. That was of iron, erected by the city in the curb, about eight inches in diameter and two and a half feet high, with a nozzle about six inches from the top, projecting over the gutter about four inches. The gutter was at least a foot wide. There was no evidence that this hydrant was not properly constructed, or that it was not properly placed where it was. It would seem that it could be placed in no position where it would be less inconvenient than in the curb. There it was, as much as possible, out of the way of pedestrians upon the sidewalk and vehicles upon the street. A hydrant answers a useful and necessary purpose, and it is required to be placed somewhere in the street; and when the public authorities determine to place one in the curb, it cannot be said that they have done a negligent act. If so, it would be negligent to permit awning or hitching posts to be placed, or trees to grow on the edge of a sidewalk, extending partly, as they frequently do, into the gutter. It is true that in a city the whole roadway must generally be kept suitable for travel. But the gutter is not properly for travel; it is made for another purpose. The finding, therefore, that the city was negligent as to this hydrant, was without any evidence to support it.

The liability of the city must, therefore, rest entirely upon the obstruction caused by the heap of ashes. If it carelessly permitted that to remain there obstructing to some extent the roadway, it would be responsible for any accidents caused by it, but only for such accidents as would not have occurred but for such obstruction. We cannot say, upon the evidence, that that obstruction caused the accident; and the referee has not found that it did. He found that that and the other obstruction, as to which the city was not in fault, did. When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause, unless without its operation the accident would not have happened. We cannot say, from the evidence or the findings of the referee, that the heap of ashes was the cause of the accident, without which it would not have happened.

The referee erred in finding that the city was negligent as to the hydrant; and we cannot say that this error was not harmful to the defendant.

The judgment must, therefore, be reversed and a new trial granted, costs to abide event. All concur.

Judgment reversed.

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WESTERN RY. OF ALABAMA v. MUTCH.

(Supreme Court of Alabama, 1892. 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179.)

STONE, C. J.[8] The plaintiff, George Mutch, was a resident of Opelika. His son, James Mutch, was 9½ years old, well grown and developed for his age, and, in intelligence and brightness, was above the average of boys of his age. He went at large without being attended by a nurse or protector, and was attending school. The Western Railway of Alabama runs through Opelika, and has a station and depot in that city or town. There was an ordinance of force in Opelika which made it unlawful to run a train of cars within the corporate limits at a higher rate of speed than four miles an hour, and imposing a penalty for its violation. A freight train of the railroad was coming into Opelika on an afternoon in March, 1889. It had box cars, and attached to the side of one of them was a ladder, placed there to enable brakemen to reach the top of the car. The little boy, James, having placed himself at the side of the track, attempted to seize the ladder as it passed him, that he might climb up on it, and thus enjoy a ride. He did succeed in catching a round of the ladder, but, in attempting to ascend, he missed his footing, fell under the train, and was so injured and crushed that he died of the wounds. * * *

The present suit was brought against the railroad, and seeks to recover damages from it for this alleged negligent killing of plaintiff's intestate. The negligence charged (and there is no other pretended, or attempted to be shown) is that the train was being moved at a greater rate of speed than four miles an hour. * * * Assuming that the speed of the train was in excess of four miles an hour, was there a causal connection between such breach of duty on the part of the railroad company and the injury done to plaintiff's intestate?

Persons who perpetrate torts are, as a rule, responsible, and only responsible, for the proximate consequences of the wrongs they commit. In other words, unless the tort be the proximate cause of the injury complained of, there is no legal accountability. In that able and valuable work, 16 Am. & Eng. Enc. Law, 436, is this language: "A 'proximate cause' may be defined as that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, producing the result complained of, and without which that result would not have occurred; and it is laid down in many cases, and by leading text writers, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen, in the light of the attending circumstances." On page 431 of the same volume it is said:

[8] Part of the opinion is omitted.

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"To constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence, without intervening efficient causes; so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury." That philosophic law writer, Dr Wharton (Law of Negligence, § 75), expresses the principle as follows: "If the consequence flows from any particular negligence, according to ordinary natural sequence, without the intervention of any human agency, then such sequence, whether foreseen as probable, or unforeseen, is imputable to the negligence." Quoting from Chief Baron Pollock with apparent approval, he (in section 78) says: "I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated. I am inclined to consider the rule of law to be this: That a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In the same section he quotes approvingly the following language from Lord Campbell: "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action." In Shearman & Redfield's Law of Negligence (section 26) the principle is thus stated: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." * * *

Lynch v. Nurdin, 1 Q. B. (N. S.) 29, 41 E. C. L. 422, is the strongest of the cases relied on in support of the present action. The injury in that case occurred in a city. The headnote contains a summation of the facts as follows: "Defendant (a cartman) negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play. Another child incautiously led the horse on, and plaintiff was thereby thrown down, and hurt." It was held that the action was maintainable for the recovery of damages, "and that it was properly left to the jury whether defendant's conduct was negligent, and the negligence caused the injury." In delivering his opinion, Lord Denman used the following language: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that in-

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jury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. * * * Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent: that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." Reading the case of Lynch v. Nurdin in the light shed upon it by Lord Denman's reasoning, no one can fail to note the marked difference between that case and the one we have in hand. The argument by which the learned Lord Chief Justice supported the judgment he announced has no application to the present one. That case was manifestly decided on the well-recognized principle that if one leave dangerous machinery, or any other thing of similar nature, unattended, and in an exposed place, and another be injured thereby, an action on the case may be maintained for such injury, unless plaintiff was guilty of contributory negligence. * * * Infants of tender years, and wanting in discretion, are not amenable to the disabling effects of contributory negligence. In the opinion of the court in the case of Lynch v. Nurdin the causal connection between the negligence and the injury was so direct and patent that the driver, exercising ordinary care and prudence, should have anticipated and guarded against it. The implication from Lord Denman's language is very strong that he regarded the cartman's conduct as grossly negligent. Contributory negligence is no defense to injuries which result from gross negligence. But the principle declared in Lynch v. Nurdin was, if not materially shaken, at least shown to be inapplicable to a case like the present one, in the two later English cases of Hughes v. Macfie, 2 Hurl. & C. 744, and Mangan v. Atterton, L. R. 1 Exch. 239. * * *

The ordinance of Opelika, restricting the speed of trains within the corporate limits to four miles an hour, had one purpose—one policy. Opelika is a town probably of four or more thousand inhabitants. The railroad antedated the town, and caused its location there. It runs centrally through the business portions of the place. In such conditions, men pursuing business avocations, as well as idlers and curiosity seekers, will congregate about the depot and track of the railroad, and will be constantly crossing, if not standing on, the track. They do both. Knowing this habit of men, most towns located on railroads have ordinances requiring trains passing through them to move at a low rate of speed. Why? Not because they apprehend that reckless persons will attempt to board the train while in motion. The wildest conjecture would scarcely take in an adventure so fraught with peril. The policy was to enable persons who might be standing on the track,

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or whose business pursuits required them to cross it, to get off the track, and thus escape the danger of a collision. The ordinance had no other aim.

We hold as matter of law that there was no proof whatever in this case tending to show a causal connection between the negligence charged and the injury suffered. * * *[9]

SCHEFFER v. RAILROAD CO.

(Supreme Court of United States, 1881. 105 U. S. 249, 26 L. Ed. 1070.)

Charles Scheffer was injured in a collision on defendant's railroad on December 7, 1874, the accident being due to the carelessness of the officers of the company. His head, face, neck, back, and spine were injured, and nervous prostration followed. After continued sickness and suffering, Scheffer committed suicide on August 8, 1875. This action was brought by his executors, asking damages for his death. A demurrer to the declaration was sustained, and plaintiffs appealed.

MILLER, J.[10] [After commenting upon the cases of Milwaukee & St. Paul R. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, and McDonald v. Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768:] Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his

[9] See Firth v. Bowling Iron Co., 3 C. P. Div. 254 (1878), where defendants were held liable for the loss of plaintiff's cow, which had died from eating portions of defendant's iron fence, which had decayed and fallen and become hidden in the grass on plaintiff's land.

See Lee v. City of Burlington, 113 Iowa, 356, 85 N. W. 618, 86 Am. St. Rep. 379 (1901), where it was held that the death of a horse from fright at a steam roller was not the proximate result of the negligence of the defendant in operating the roller.

[10] Part of the opinion is omitted, and the statement of facts is rewritten.

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suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death.

Judgment affirmed.

VICARS v. WILCOCKS.

(Court of King's Bench, 1806. 8 East, 1.)

Action for slander, in that the defendant had falsely asserted that the plaintiff had cut certain flocking cord, by reason of which one J. O. had dismissed plaintiff from his service, and one R. P. had refused to receive plaintiff into his service.

Lord ELLENBOROUGH, C. J., said, that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his Lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, non liquet that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with R. P. than the mere words themselves of the defendant.

Rule refused.[11]

GEORGIA v. KEPFORD.

(Supreme Court of Iowa, 1876. 45 Iowa, 48.)

The first count of the petition alleges no special damages. The second count alleges that plaintiff was, at the time of speaking the words charged, a married man; that said words were spoken by defendant maliciously to slander plaintiff, and to cause his wife to leave him; that in consequence of so speaking said words plaintiff's wife soon thereafter did abandon him, refused to live with him, and commenced an action of divorce, whereby this plaintiff was to great expense in defending the same, all to his damage in the sum of $5,000. There

[11] See, also, accord: Moore v. Meagher, 1 Taunt. 39 (1807); Ashley v. Harrison, 1 Esp. 48 (1793); Ward v. Weeks, 7 Bing. 211 (1830); Knight v. Gibbs, 1 Adol. & E. 43 (1843). But see Green v. Button, 2 C., M. & R. 707 (1835), and Kendillon v. Maltby, 1 Car. & M. 402 (1842), where doubt is expressed on the principal case.

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was a jury trial, and a verdict and judgment for plaintiff for $500. Defendant appeals.

DAY, J.[12] On the trial of the cause the plaintiff introduced evidence tending to prove the speaking by defendant of the words charged in the petition, and that in consequence thereof the wife of plaintiff abandoned him, and thereafter began an action for divorce against him on the ground of inhuman treatment.

The plaintiff was sworn in his own behalf, and was asked the following question: "State what expense, if any, you were to in looking after and defending the divorce suit brought against you by your wife."

The defendant objected to this question on the ground that the damage sought to be proved was too remote. The objection was overruled, and plaintiff answered that he spent 30 days' time, worth $2.50 per day, and paid his attorneys $25. The admission of this testimony is assigned as error.

The testimony, we think, was improperly admitted. Damage to be recoverable must be the proximate consequence of the act complained of; it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances. Dubuque Wood & Coal Association v. City of Dubuque, 30 Iowa, 176.

An action for divorce on the ground of inhuman treatment is not the proximate consequence of a charge of larceny or adultery.

It is claimed that the court erred in charging that the jury might give special damages for the wife's desertion, if caused by the speaking of the slanderous words alleged.

General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, but are not implied by law; and are either superadded to general damages, arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. Chitty on Pleading, vol. 1, p. 458, quoted in Sedgwick on Damages (6th Ed.) p. 732. But damages, both general and special, must be the natural and proximate, though not the necessary, consequence of the act complained of. Sedgwick on Measure of Damages, p. 66; Beach v. Ranney, 2 Hill (N. Y.) 309, 314. A man is not responsible for all the remote and possible consequences which may result from his act, although he may be a wrongdoer. Beach v. Ranney, supra.

Now, whilst desertion by the wife of a husband against whom simply a slanderous charge of larceny and adultery had been preferred, might,

[12] Part of the opinion is omitted.

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in exceptional cases, follow, as a consequence of the charge, yet we think that such a result is not the natural and proximate consequence. A rule of law must not be adduced from what might follow in exceptional cases, and with peculiar temperaments, under particular circumstances, but from what is likely to follow under ordinary circumstances. A very suspicious or a very credulous woman might desert her husband upon the first slanderous report against him. But the question is not what a very credulous or a very suspicious woman might do, but what would an ordinary woman naturally do? Guided by these principles, we have no hesitancy in holding that, whilst in this particular case the plaintiff's wife may have abandoned him because of defendant's slander, yet such desertion was not the natural and proximate consequence of the slander.

The petition alleges that the defendant spoke the slanderous words for the purpose of causing plaintiff's wife to leave him. If this had been proved, and the instruction had been based upon the existence of such proof, it would not, probably, have been erroneous. For a party ought not to be permitted to complain that he has been held responsible for results which he sought to accomplish. But there does not seem to have been any proof that the words were spoken as an element necessary to recovery. * * *[13]

LIMING v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, 1890. 81 Iowa, 246, 47 N. W. 66.)

On November 3, 1888, William Ortman owned, and with plaintiff and his family occupied, a farm on which was a barn containing some horses which belonged to Ortman. An engine of the defendant set fire to grass on its right of way, which by reason of a high wind was swept toward this barn. The plaintiff and Ortman, being unable to check the spread of the fire, ran into the barn to unfasten the horses, thinking there was ample time. But the strong wind drove the fire suddenly to the barn, and plaintiff, in order to get out, was compelled to pass through the fire, and was badly burned. A demurrer to the petition was sustained.

ROBINSON, J.[14] * * * The question presented for our determination is not free from difficulty. Defendant is not liable unless its wrongful act was the proximate cause of the damages in suit. * * * In this case the plaintiff did not receive the injuries of which he complains in any attempt to protect human life, nor in trying to save his own property. So far as we are advised by the record, he

[13] In Lynch v. Knight, 9 H. L. Cas. 577 (1861), herein in part, post, p. 446, it was held, Lord Wensleydale dubitante, that loss of husband's consortium was not the proximate result of the speaking of slanderous words imputing to the plaintiff immorality prior to her marriage. And see, on a similar point, Allsop v. Allsop, post, p. 447.

[14] Part of the opinion is omitted, and the statement of facts is rewritten.

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was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors; and this would have been so notwithstanding the fact that defendant may have been liable for all loss which could occur, and that what he accomplished would inure to its benefit. It is the duty of every one, according to the requirements of an enlightened and just public sentiment, to use reasonable efforts to preserve the property of others from threatened destruction; and, as is well known, it is a duty which people generally are quick to discharge. Defendant could have foretold, with almost absolute certainty, when it set the fire in question, that plaintiff, being near, would use every reasonable means in attempting to save Ortman's horses from the flames, and there was nothing surprising or unusual in the attempt he made. Under the circumstances of the case, it was the natural and probable result of the wrong of defendant. A person would not be justified in exposing himself to as great danger in saving property as he would in saving human life, and whether the person injured acted with reasonable prudence would, in most cases, be a question of fact depending upon the circumstances under which the act was done. * * *

HOEY v. FELTON.

(Court of Common Pleas, 1861. 11 C. B. [N. S.] 142.)

ERLE, C. J.[15] * * * In this case, Serjeant Thomas moved for a rule nisi for a new trial, on the ground of the improper rejection of evidence. The plaintiff in the count for false imprisonment shewed that the defendant imprisoned him about half past one o'clock, and detained him till after two o'clock; and for special damage he tendered evidence to shew that he would have been taken into the employ of a cigar manufacturer if he had appeared at two o'clock at the factory; but, being unwell in consequence of the imprisonment, he had returned to his home, and, on applying at the factory on the following morning found that the place was filled up. The judge decided that this damage was too remote, and rejected the evidence.

My Brother Thomas contended that it was not too remote; and he referred to some cases; as, where a minister was allowed to shew that his congregation had diminished by reason of the slander of the defendant (Hartley v. Hemming, 8 T. R. 1); and where the captain of a passenger ship shewed that he had lost passengers by the defendant's description of his ship (Ingram v. Lawson, 6 N. C. 212, 8 Scott, 471, and other cases).

In these cases, the damage was the proximate result of the defendant's wrong. In the present case, we think it was too remote. The

[15] Part of the opinion is omitted.

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damage does not immediately and according to the common course of events follow from the defendant's wrong; they are not known by common experience to be usually in sequence. The wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible. Thus, there was the act of the plaintiff, who returned home instead of going to the factory and explaining; and, although it was said he was unwell by reason of the imprisonment, it was not suggested that he was so unwell as to be unable to go. There was also the act of the intended employer, changing his purpose in respect of the plaintiff, and making an engagement with another person.. * * *[16]

LAWRENCE v. HAGERMAN.

(Supreme Court of Illinois, 1870. 56 Ill. 68, 8 Am. Rep. 674.)

See post, p. 524, for a report of the case.

SHARP v. POWELL.

(Court of Common Pleas, 1872. L. R. 7 C. P. 253.)

Defendant's servant washed a van in the public street and allowed the waste water to run down the gutter toward a grating leading to the sewer about 25 yards off. The grating was obstructed by ice, and the water flowed over a portion of the street, which was ill-paved and uneven, and then froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped on the ice and broke its leg.[17]

GROVE, J. I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the "natural" consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; "probable" would perhaps be a better expres-

[16] See, also, Richmond & D. R. Co. v. Allison, post, p. 274.

The cases are conflicting and somewhat indefinite as to whether this result in this type of cases should be reached because of remoteness or of uncertainty. See Brown v. Cummings, 7 Allen (Mass.) 507 (1863), and R. & D. R. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728 (1893).

Among other interesting cases, involving the intervening act of a responsible agency, are Burton v. Pinkerton, L. R. 2 Exch. 340 (1867); Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234 (1822); Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216 (1899); State v. Ward, 9 Heisk. (Tenn.) 100 (1871); Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446 (1876).

[17] The statement of facts is rewritten.

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sion. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted. But there must be some limit to the liability of a man for the consequences of a wrongful act; and it does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel. The defendant was not bound to go down the street and see whether or not any obstacle existed at the drain. I cannot therefore see that the damage to the plaintiff's horse was the proximate or the probable result of the washing of the defendant's van in the street rather than in his own stable or coach-house. I think Mr. Lanyon put the case upon the true ground. The damage complained of was not proximately caused by the original wrongful act of the defendant.[18]

CHAMBERLAIN v. CITY OF OSHKOSH.

(Supreme Court of Wisconsin, 1893. 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928.)

The complaint in substance alleged that the defendant had negligently permitted a large hole to exist in the usual course of travel over a stone crossing and sidewalk, at the intersection of Merritt and Ford streets, in the city of Oshkosh; that such hole had become filled with water, which had become frozen over with a large surface of smooth ice; and that no precaution had been taken to guard passers-by from falling. The plaintiff asserted that she had, in consequence, fallen and had sustained great bodily injuries. The defendant appeals from a judgment for the plaintiff.

ORTON, J.[19] * * * It will be observed that the complaint does not charge that the plaintiff's injury was caused by a hole or depression in the cross walk, but that it was caused wholly by the smooth surface of the ice at that place, and such was the evidence. The plaintiff slipped and fell on the smooth surface of the ice. The ice was the proximate cause of the injury. The depression in the walk where the ice formed, if a defect, and a cause of the injury in any sense, was a remote, and not the proximate, cause of the injury. But at this time there was no hole, or even depression, at that place. It was filled up by the ice. It is too plain for argument that the cause of the plaintiff's injury, both by the complaint and testimony, was the smooth surface of the ice on the cross walk. The special verdict is careful not to state

[18] Bovill and Keating, JJ., delivered concurring opinions.

[19] Part of the opinion is omitted, and the statement of facts is rewritten.

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the defect or dangerous condition. It will be observed, also, that the negligence of the city consists "in failing to provide a safe crossing or passage over and around said large surface of smooth ice, and allowed and permitted said crossing to remain in such insufficient, unsafe, and defective condition for a period of four weeks, and failed to take any precaution to prevent or warn travelers over said crossing or sidewalk from walking upon and over said surface of ice." The existence and continuance of said ice for four weeks was the presumptive notice to the city of the defect complained of. The plaintiff does not complain of being injured by the hole or depression, but by the "large surface of smooth ice." The depression was the cause of the water accumulating there, and the water, combined with a low temperature, caused the ice to form which injured the plaintiff. The depression was a remote cause or cause of causes. The proximate or direct cause was the ice, and this must be the cause of action. "Causa proxima, non remota, spectatur." The proximate, and not the remote, cause, must be considered. The cause nearest in order of causation, which is adequate to produce the result, is the direct cause. In law, only the direct cause is considered. These are familiar maxims. "The proximate cause is the cause which leads to, and is instrumental in producing, the result." 3 Amer. & Eng. Enc. Law, 45; State v. Railroad Co., 52 N. H. 528.

In this case the hole or depression is not the cause of the injury for which an action may be brought. It is too remote. There is a direct cause of the injury, and that is the ice on which she slipped down, and that is the only one which can be considered. The defect in the street or walk is the ice, and the negligence of the city consists in allowing it to remain. This was dangerous to the traveling public, and the cause of the plaintiff's injury in the law and by the complaint and testimony. This ice was smooth and level, and accumulated through the sole agency of the elements and in the order of nature. No argument, speculation, or casuistry can make this case any different from this. The main and important question which first presents itself on the demurrer to the complaint, and again on the motion for a nonsuit, is, is such a condition of the walk an actionable defect? * * * The hole or depression does not combine with the ice, and is not present with it. There is no hole at the time, as it is filled with ice, and the surface is made level as ice can be anywhere. The plaintiff was not injured by stepping into the hole, but by slipping on the ice. But I have said enough of this. The hole was only the remote cause, or cause of causes, which produced the result, and was not the direct, efficient, or adequate cause, which alone is actionable. * * *[20]

[20] Contra: McCloskey v. Moies, 19 R. I. 297, 33 Atl. 225 (1895); Adams v. Chicopee, 147 Mass. 440, 18 N. E. 231 (1888).

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GREEN-WHEELER SHOE CO. v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, 1906. 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. [N. S.] 882.)

Action to recover the value of two parcels of goods delivered by plaintiff to defendant at Ft. Dodge, Iowa, one parcel to go to Booneville, Mo., and the other to Chanute, Kan., one of which it is alleged was lost and the other damaged by defendant's negligence. The case was tried on an agreed statement of facts and judgment was rendered for defendant. Plaintiff appeals. Reversed.

McCLAIN, C. J.[21] In the agreed statement on which the case was tried without other evidence being introduced, it is stipulated that the defendant was guilty of negligent delay in the forwarding of the goods of plaintiff from Ft. Dodge to Kansas City, where they were lost or injured on May 30, 1903, by a flood which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby.

We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss. On this question there is a well-recognized conflict in the authorities. In several well-considered cases decided by courts of high authority it was decided, while the question was still new, that the negligent delay of the carrier in transportation could not be regarded as the proximate cause of an ultimate loss by a casualty which in itself constituted an act of God, as that term is used in defining the carrier's exemption from liability, although had the goods been transported with reasonable diligence they would not have been subjected to such casualty, and these cases are very similar to the one before us inasmuch as the loss in each instance was due to the goods being overtaken by an unprecedented flood for the consequence of which the carrier would not be responsible. Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Hunt v. Missouri, K. & T. R. Co. (Tex. Civ. App.) 74 S. W. 69; Gleeson v. Virginia Midland R. Co., 5 Mackey (D. C.) 356. These cases are predicated upon the view that if the carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss, and should be disregarded in determining the liability for

[21] Part of the opinion is omitted.

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such loss. A similar course of reasoning has been applied in other cases, where the loss has been due immediately to some cause such as accidental fire involving no negligence on the part of the carrier and within a valid exception in the bill of lading, but the goods have been brought within the peril stipulated against by negligent delay in transportation. Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Yazoo & M. V. R. Co. v. Millsaps, 76 Miss. 855, 25 South. 672, 71 Am. St. Rep. 543; General Fire Extinguisher Co. v. Carolina & N. W. R. Co., 137 N. C. 278, 47 S. E. 208. For similar reasons it has been held that loss of or injury to the goods by reason of their inherent nature, as by freezing or the like, will not render the carrier liable, even after negligent delay in transportation, if such casualty could not have been foreseen or anticipated as the natural and probable consequence of such delay. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Herring v. Chesapeake & W. R. Co., 101 Va. 778, 45 S. E. 322.

On the other hand, it was held by the Court of Appeals of New York in a case arising out of the same flood which caused the destruction of the goods involved in Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645, supra, that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by the flood, was sufficient ground for holding the carrier to be liable for the loss. Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. And the same court has adhered to this view in case of a loss by fire covered by valid exception in the bill of lading. Condict v. Grand Trunk R. Co., 54 N. Y. 500. The Illinois Supreme Court has consistently followed the rule of the New York cases in holding that negligent delay subjecting the goods to loss by the Johnstown flood rendered the carrier liable (Wald v. Pittsburg, C., C. & St. L. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332) and likewise that similar delay rendered the carrier liable for damage to the goods by freezing. * * *

The irreconcilable conflict in the authorities is recognized by textwriters, and while the weight of general authority has in many cases been said to support the rule announced in Massachusetts and Pennsylvania cases (1 Thompson, Negligence, § 74; Schouler, Bailments [Ed. 1905] § 348; Hale, Bailments and Carriers, 361; 6 Cyc. 382; notes in 36 Am. St. Rep. 838), other authorities prefer the New York rule (Hutchinson, Carriers [2d Ed.] § 200; Ray, Negligence of Imposed Duties, 177). In the absence of any express declaration of this court on the very point, and in view of the fact that in most recent cases the conflict of authority is still recognized (see 5 Cur. Law, 517) it seems necessary that the reasons on which the two lines of cases are supported shall be considered in order that we may now reach a conclusion which shall be satisfactory to us. * * *

Now, while it is true that defendant could not have anticipated this

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particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay that would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee. that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. * * *

We are satisfied that the sounder reasons, supported by good authority, require us to hold that in this case the carrier is liable for the loss of and damage to plaintiff's goods, and the judgment of the trial court is therefore reversed.[22]

VOSBURG v. PUTNEY.

(Supreme Court of Wisconsin, 1890. 78 Wis. 85, 80 Wis. 523, 47 N. W. 99, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47.)

The plaintiff was about 14 years of age, and the defendant about 11 years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent

[22] Among many other interesting cases involving an inquiry as to whether the act complained of was an efficient factor in or only a condition antecedent to the injury, the following may be especially cited: Bosch v. B. & M. R. R. Co., 44 Iowa, 402, 24 Am. Rep. 754 (1876); Metallic Compression Co. v. Fitchburg R. R. Co., 109 Mass. 277, 12 Am. Rep. 689 (1872); McClary v. Sioux City & P. R. R. Co., 3 Neb. 44, 19 Am. Rep. 631 (1873); Morrison v. Davis & Co., 20 Pa. 171, 57 Am. Dec. 695 (1852); Alexander v. Town of Newcastle, 115 Ind. 51, 17 N. E. 200 (1888); Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176 (1870).

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for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. The jury rendered a verdict for the plaintiff of $2,800.

LYON, J.[23] * * * Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action ex contractu, and not ex delicto, and hence that a different rule of damages—the rule here contended for—was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. * * *

[23] Part of the opinion is omitted.

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McNAMARA v. VILLAGE OF CLINTONVILLE.

(Supreme Court of Wisconsin, 1885. 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.)

The plaintiff stepped off an elevated walk, which was not protected by railings, and was severely injured. It appeared that he had a predisposition to inflamatory rheumatism, and it was asserted that his injuries were more severe and his sickness more prolonged by reason thereof. From a judgment for the plaintiff, the defendant appeals.

CASSODAY, J.[24] * * * Exception is taken because the court charged the jury, in effect, that if they found for the plaintiff, then no deduction should be made from the damages sustained, by reason of his disability having been prolonged in consequence of a predisposition to inflammatory rheumatism, and because the court refused to charge, in effect, that the plaintiff could not recover if the injury was the result of the disease, and not the direct and proximate result of the defendant's negligence. There is no evidence that would warrant the jury in finding that the disease interfered in the least with the plaintiff's powers of locomotion, or in any way contributed to his stepping or falling from the sidewalk at the time and place in question. The jury have found, in effect, that there was no negligence on the part of the plaintiff contributing to the injury, and hence that it was the direct and proximate result of the defendant's negligence alone. The presence of the disease may have aggravated and prolonged the injury, and correspondingly increased the damages. The jury were expressly authorized to include in their verdict such increased or additional damages, and we must assume that they did. Was this error?

Under the repeated decisions of this court, we must answer this question in the negative. Oliver v. La Valle, 36 Wis. 592; Stewart v. Ripon, 38 Wis. 584; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. In one of these cases the plaintiff was allowed to recover increased damages by reason of an organic tendency to scrofula in his system, and in each of the others by reason of a miscarriage in consequence of the injury. In the Brown Case the distinction was made between actions for tort, where the wrong-doer is held liable for all injuries naturally resulting directly from the wrongful act, though unforeseen, and actions for the breach of contract, where the damages are limited to such as arise naturally from such breach of contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of the contract. * * * See, also, the late case of McMahon v. Field, 7 Q. B. Div. 595, where the plaintiff recovered on contract for the injury to his horses, who caught cold from unnecessary exposure to the weather. In that case Hobbs v. Railway, L. R. 10 Q. B. 111, is severely criticised and narrowly limited, if not entirely overruled. * * * In McMahon v.

[24] Part of the opinion is omitted, and the statement of facts is rewritten.

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Field one of the judges went so far as to say that "the parties never contemplated a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract." To the same effect is Ehrgott v. Mayor, etc., 96 N. Y. 280, 48 Am. Rep. 622. In this New York case the court say: "When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. * * * A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. * * * The true rule, broadly stated, is that a wrongdoer is liable for the damages which he causes by his misconduct." 96 N. Y. 281, 48 Am. Rep. 622.

"The general rule in tort," says Mr. Sutherland (3 Suth. Dam. 714), "is that the party who commits a trespass, or other wrongful act, is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done." This is expressly sanctioned in the Maryland case cited where a cancer was the intervening cause. It is a contradiction to say that parties contemplate—have in mind—things of which they are supposed to be unmindful. In the case cited from Indiana the court say a wider range of inquiry is permissible in actions for tort than for the simple breach of a contract. See Shirley's notes, 329. In that case the court quotes approvingly the rule stated by Mr. Thompson, which is substantially the same rule quoted from Addison approvingly in the Maryland case, that "whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequence be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer." Here the action is not on contract, but for a tort consisting of a breach of statutory duty. The defect in the walk is supposed to have been known to the officers of the municipality. The predisposition to inflammatory rheumatism was an intervening cause, but it was set in motion by the tortious act complained of. It is not likely that the officers of the village actually contemplated that the injury in question would result from the defect in the walk. They must have known, however, that all classes of people, infirm as well as firm, diseased as well as healthy, were liable to travel upon the walk. Under ordinary circumstances the infirm and diseased would have no difficulty in passing over the walk without incurring injury. But the plaintiff, under the circumstances stated, as found by the jury, incurred the injury without any fault on his part. The mere fact that he was more susceptible to serious results from the injury by reason of the presence of disease, did not prevent him from recovering the damages he had actually sustained. * * *[25]

[25] The fact that the state of the plaintiff's health or a pre-existing tendency toward disease made the results of defendant's wrongful act unusually

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LEWIS v. FLINT & P. M. RY. CO.

(Supreme Court of Michigan, 1884. 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790.)

COOLEY, C. J.* Action to recover damages for a personal injury. The facts as they appeared on the trial were as follows:

The plaintiff resides in the township of Huron, a few miles east of Belden station, on the road of defendant. He was at Wayne station on the evening of January 12, 1883, awaiting the train which was to go south past Belden in the night. The train left Wayne at 3:05 in the morning of the 13th, and he procured his ticket and took passage for Belden, where the train was due at 3:30. The night was dark, cold, and wet. The train stopped when "Belden" was called, and plaintiff got off. Belden was only a flag station for this train, and there was no one in charge of the station-house, and no light there. When plaintiff got off the train he was told by the brakeman or conductor that they had run by the station about two car lengths, and he replied that if that was all, it was no matter, as he had to go that way. An east and west highway crosses the railroad about 24 rods south of the station-house, which the plaintiff would take in going to his home. If he was two car lengths beyond the station-house, he would still be north of the highway; and, supposing that to be the case, he followed the track along south, in preference to going back to the station-house, from which a passage east of the track would have led him to the highway. The plaintiff knew the place well, and knew that on the track he must cross an open cattle-guard to reach the highway. He had crossed this before, and sometimes found a plank laid over it. Passing on, he soon came to trees which he knew were some distance south of the highway, and he then knew the information given him as to where he was when he alighted from the train was erroneous. He turned about to retrace his steps, and followed the track in the direction of the highway. This he did carefully, because it was very dark, and he knew there was an open cattle-guard on the south side of the highway, as well as on the north side. He was looking for this cattle-guard constantly and carefully. There were burning kilns near to the track on his right, and the smoke from these affected his eyes, but he saw a switch light, which he knew was near the crossing, but which at the time was too dim to aid him. He continued to approach the cattle-guard carefully, intending, if there was a timber or plank over it, to

serious, does not therefore render the resulting damage remote. Coleman v. N. Y. & N. H. R. R. Co., 106 Mass. 160 (1871); Crane Elevator Co. v. Lippert, 63 Fed. 942, 11 C. C. A. 521 (1894); Driess v. Frederick, 73 Tex. 460, 11 S. W. 493 (1889); Baltimore City P. R. Co. v. Kemp, 61 Md. 619, 48 Am. Rep. 134 (1884); Tice v. Munn, 94 N. Y. 621 (1883); Mann Boudoir Car Co. v. Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289 (1893).

*Part of the opinion is omitted.

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cross upon that; and if not, then to pass down into it and climb out. In the dim light he saw what he believed to be the cattle-guard, which seemed to be several paces off, but at the very next step one foot slipped, and as he attempted to save himself by springing upon the other, the other foot caught, and he was precipitated into the cattle-guard, and he received an injury of a very serious and permanent nature. He was for a time senseless, but then succeeded in drawing himself out by his elbows,—not being able to use his lower limbs,—and with great difficulty he reached a neighboring tavern, where he was cared for. * * *

The court took the case from the jury, and directed a verdict for the defendant. This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant and for that reason would not support an action. The wrong of the defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not a proximate consequence of this wrong, the instruction of the court was right; otherwise, not. The difficulty here is in determining what is and what is not a proximate consequence in contemplation of law.

For the plaintiff, the cases are cited in which it has been held that one whose negligence causes a fire by the spreading of which the property of another is destroyed, is liable for the damages, though the property for which the compensation was claimed was only reached by the fire after it had passed through intervening fields or buildings. Kellogg v. Railroad Co., 26 Wis. 223, 7 Am. Rep. 69; Fent v. Railroad Co., 59 Ill. 349, 14 Am. Rep. 13; Wiley v. Railroad Co., 44 N. J. Law, 248; Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. But these cases, we think, are not analogous to the one before us. * * * To show what is understood by intervening cause, it may be useful to refer to a few cases:

Livie v. Janson, 12 East, 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was damaged by perils of the sea, stranded, and wrecked on Governor's Island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is Delano v. Insurance Co., 10 Mass. 354, 6 Am. Dec. 132, where a like result was reached.

In Tisdale v. Norton, 8 Metc. (Mass.) 388, the facts were that a highway was defective and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in

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the statute which gives an action against the town; and the proximate cause in this case was outside the highway, not within it.

In Anthony v. Slaid, 11 Metc. (Mass.) 290, the plaintiff, who was contractor with a town to support for a specified time and for a fixed sum all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of the paupers, as a consequence of which the plaintiff was put to increased expense for care and support, but the action was held not maintainable.

In Silver v. Frazier, 3 Allen (Mass.) 382, 81 Am. Dec. 662, it was decided that a principal whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said Bigelow, C. J.: "The alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statement of the defendant. In other words, the plaintiff alleges that his agent violated his duty, and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent, by false statements, to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good cause of action to the plaintiff."

In Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge, which was to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and, while awaiting repair by the city, whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood; but it was held he could not recover. Beck, J., in deciding the case, illustrates the principle as follows: "An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city, which he attempts to cross, from defects therein, falls, and his horses are killed. By the breaking of the bridge and the loss of his team he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses; the secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally caused its loss. Damage on account of the first is recoverable, but for the second is denied." * * *

In Bosch v. Railroad Co., 44 Iowa, 402, 24 Am. Rep. 754, the plaintiff's house took fire, and the fire department, because, as was alleged,

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of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."

In this last case Metallic Compression Co. v. Railroad Co., 109 Mass. 277, 12 Am. Rep. 689, was referred to and distinguished. The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of defendant was recklessly run upon the hose and severed it, thereby defeating the efforts to extinguish the fire, which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. * * *

Further reference to authorities is needless. The application of the rule that the proximate, not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left, and beyond where he had a right, from the information received from defendant's servants, to suppose he was when he left the car. For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible. But before any injury had been sustained the plaintiff discovered where he was, and started back for the road which he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. * * * Misled apparently by visual deception, he moved forward under a supposition that the cattle-guard, upon the brink of which he already stood, was some paces off, and his deception, with the slipping of his foot, concurred to produce the injury. What was this but pure accident? It was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the foot to slip; and such wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God; in the other, inevitable accident; but not more plain-

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ly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long sequence; but, as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

The injury being the result of pure accident, the party upon whom it has chanced to fall is necessarily left to bear it. * * *

BROWN v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, 1882. 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.)

The plaintiffs took defendant's train from Kilbourn for Mauston, and were put off instead three miles distant from the latter place by the brakeman. It was night and cloudy. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to the bridge, about a mile east of Mauston, and then they thought it easier to go on to Mauston than seek shelter at the house, which was a considerable distance from the track. They went on to Mauston and arrived there late at night, Mrs. Brown quite exhausted from the walk. She was pregnant at the time. She had severe pains during the night, and the pains continued from time to time, and after a few days she commenced flowing. The pains and flowing continued until some time in December, when a miscarriage took place, after which inflammation set in, and for some time she was so sick that she was in imminent danger of dying. The plaintiffs claim that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take.

TAYLOR, J.[26] * * * The first position taken by the learned counsel for the appellant is that the cause of action set out in the plaintiffs' complaint is for a breach of contract, and not an action in tort. Upon this point we cannot agree with the appellant. We think the gravamen of the action is the negligence and carelessness of the appellant's agents and employés in directing the plaintiffs to leave the train before they had arrived at the end of their journey. They did not leave at a place short of their destination knowing that fact, but through the neglect of the appellant's employés they were induced to leave the train short of their journey's end, supposing that they had reached it. It is true, the plaintiffs in their complaint state that they paid their fare and went on board the train as passengers, to be carried from one point to another upon the appellant's road, and that by

[26] Part of the opinion is omitted.

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reason of such payment and entry upon that train it became the duty of the appellant to carry them from the point of starting to their destination. These facts are, perhaps, sufficient to constitute a contract on the part of the appellant to safely carry them to their destination. Still, it is necessary in all actions against a carrier of passengers to state facts which show the right of the party to be carried before he can complain of any breach of duty on the part of the carrier in not conveying them safely, or in not carrying them to their destination. The complaint in this case is not so much that the plaintiffs were not carried to their destination, but that on the way the appellant's employés carelessly and negligently induced them to quit the train before they arrived at their destination, and that in consequence of such wrong on the part of the appellants they suffered damage. It is the negligence in putting the plaintiffs off the train before the journey was completed which is complained of, and not a breach of the contract for not carrying them to the end of their journey. * * *

In this case we deem it material to determine whether the action is an action for a tort, or an action for a breach of the contract to carry the plaintiffs to their destination, because we think the rules of damages in the two actions are essentially different. We hold that the action in this case is based upon the tort of the defendant in negligently and carelessly directing the plaintiffs to leave the cars before they reached their destination. * * *

The important question in the case is whether the appellant is liable for the injury to Mrs. Brown, admitting that it was caused by her walk to Mauston. Whether the sickness of Mrs. Brown was caused by the walk to Mauston was an issue in the case, and the jury have found upon the evidence that it was caused by the walk. There is certainly some evidence to sustain this finding of the jury, and their finding is, therefore, conclusive upon this point. Admitting that the walk caused the miscarriage and sickness of the plaintiff Mrs. Brown, it is insisted by the learned counsel for the appellant that the appellant is not liable for such injury; that it is too remote to be the subject of an action; that the negligence and carelessness of the defendant's employés in putting the plaintiffs off the cars at the place they did was not the proximate cause of the miscarriage and sickness, and for that reason the appellant company is not liable therefor.

To sustain this position of the learned counsel for the appellant reliance is placed upon the case of Walsh v. Railway Co., 42 Wis. 23, 24 Am. Rep. 376, and it is insisted that there can be no real distinction made between that case and this. Upon a careful examination of that case it will be seen, we think, the court did distinguish between an action which was purely an action for a breach of contract and one in tort. * * * The present Chief Justice, who wrote the opinion in the case, takes special pains to show that the action was based solely upon a breach of contract, and was in no sense an action of

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tort, and he expressly declares that the rule of damages is not the same where the action is for a breach of contract as for a tort. * * *

The Chief Justice then quotes at large from the case of Hobbs v. Railway Co., 10 L. R. Q. B. 111, with approval. In that case the English Court of Appeals held that when the railway company had neglected or refused to carry the plaintiffs to their destination, and they were compelled to get out at a station about five miles from it, late at night, and being unable to get a conveyance or accommodation at an inn they walked home a distance of five miles in the rain, and the wife caught cold and was sick as a consequence of the walk and exposure, they could not recover for the injury to the wife. It would seem, from the opinions given by the learned judges in the Hobbs Case, that they treated the action as an action upon contract and not an action for a tort. All the judges speak of it as an action to recover for the breach of contract to carry the plaintiffs to their destination.

The rule as to what damages may be recovered in actions for breach of contract is laid down by this court in the case of Candee v. Telegraph Co., 34 Wis. 479, 17 Am. Rep. 452, cited from Hadley v. Baxendale, 9 Exch. 341, and approved. It is as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The latter part of this rule, as above quoted, would seem to cover all cases of breach of contract; for it must be presumed that the parties would reasonably be supposed to have contemplated that the party injured by the breach of the contract would sustain such damages as would fairly and substantially, in the usual course of things, result from such breach. And so it is often said that, in an action for a breach of contract, the damages to be recovered are such as may reasonably be supposed to have been in the contemplation of both parties when they made it. Under this rule the damages which may be recovered in an action for the breach of a contract are sometimes more remote and far-reaching than those recoverable for a tort. * * *

In the case of Hobbs v. Railway Co., supra, the learned justices state the rule in case of breach of contract in more concise language. They say: "Such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it." Under this rule it was held in the Hobbs Case, and by this court in the Walsh Case, that in an action for a breach of contract in failing to carry a passenger to his destination damages could not be recovered for injury

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to the health, annoyance, and vexation of mind and mental distress, on the ground that such damages were not such as the parties making the contract would contemplate as likely to result from its breach.

We are not disposed now to question the correctness of the decision made by this court in the case of Walsh v. Railway Co., supra, limited as that case was to an action solely for a breach of contract. In such cases the willfulness of the party in refusing to fulfill the contract does not in any way change the rule of damages. The rule as to the damages in actions upon contract is the same whether the breach be by mistake, pure accident, inability to perform it, or whether it be willful and malicious. The motives of the party breaking the contract are not to be inquired into. 1 Sedg. Meas. Dam. 439 et seq., and cases cited.

The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Meas. Dam. 130, note. * * *

As stated by Justice Colt in the case of Hill v. Winsor, 118 Mass. 251: "It cannot be said, as a matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence."

In the case of Bowas v. Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713, Judge Hoffman, speaking of the rule in relation to damages on a breach of contract, as contrasted with the rule in case of wrongs, says: "The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, when the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered by the defendant. But this rule, as Mr. Sedgwick remarks, has no application to torts. He who commits a trespass must be held to contemplate all the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and so far as it is plainly traceable he must make compensation for it."

The justice and propriety of this rule are manifest, when applied to cases of direct injury to the person. If one man strike another, with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual can make no difference. If the wrongdoer should in fact intend but slight injury, and deal a blow

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which in ninety-nine cases in a hundred would result in a trifling injury, and yet by accident produced a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrongdoer from the consequences of his act. The real question in these cases is, did the wrongful act produce the injury complained of? and not whether the party committing the act would have anticipated the result. The fact that the act of the party giving the blow is unlawful renders him liable for all its direct evil consequences. * * *

In the case at bar the question to be determined is whether the negligent act of the defendant's employés in putting the plaintiffs and their child off the train in the nighttime, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies. We must in considering this case take it for granted that the walk from the place where they left the cars to Mauston was the immediate cause of the injury complained of, and the negligence of the defendant in putting them off the cars was the mediate cause. We think the question, whether there was any negligence on the part of the plaintiffs in taking the walk, was properly left to the jury, as a question of fact, and they found that they were guilty of no negligence on their part. They found themselves placed by the wrongful act of the defendant where it became necessary for their protection to make the journey.

The fact that there was a station-house near by, at which they might have found shelter until another train came by, is not conclusive that the plaintiffs were negligent in the matter. They were landed at a place where they could not see it, and the jury have found that under the circumstances they were not guilty of negligence in not finding it. The defendant must, therefore, be held to have caused the plaintiffs to make the journey as the most prudent thing for them to do under the circumstances. And, we think, under the rules of law, the defendant must be liable for the direct consequence of the journey. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and, on account of the state of health of the parties, in their attempts to find shelter they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. The wrongful act of the defendant would be the natural and direct cause of their deaths, and it would seem to be a lame excuse for the defendant, that if the plaintiffs had been of more robust health they would not have perished or have suffered any material injury.

The defendant is not excused because it did not know the state of health of Mrs. Brown, and is equally responsible for the consequence of the walk as though its employés had full knowledge of that fact. This court expressly so held in the case of Stewart v. City of Ripon, 38 Wis. 584, and substantially in the case of Oliver v. Town of La Valle, 36 Wis. 592.

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Upon the findings of the jury in this case it appears that the defendant was guilty of a wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendant's wrongful act; and that, on account of the peculiar state of health of Mrs. Brown at the time, she was injured by such walk. There was no intervening independent cause of the injury other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury, within the decisions above quoted. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger.

When by the negligence of another a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself under the circumstances, the person guilty of the negligence is liable for the injury received in such attempt to escape, even though no injury would have been sustained had there been no attempt to escape the threatened danger. This was so held, and we think properly, in the case of a passenger riding upon a stagecoach, who, supposing the coach would be overturned, jumped therefrom and was injured, although the coach did not overturn, and would not have done so had the passenger remained in his seat. The passenger acted upon appearances, and, not having acted negligently, it was held he could recover; it being shown that the coach was driven negligently at the time, which negligence produced the appearance of danger. Jones v. Boyce, 1 Starkie, 493. The ground of the decisions is very aptly and briefly stated by Lord Ellenborough in the case as follows: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

So in the case at bar the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause, and it is its proximate cause, within the rules of law upon that subject. The true meaning of the maxim, causa proxima, non remota, spectatur, is probably as well defined by the late Chief Justice Dixon in the case of Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, as by any other judge or court. He states it as follows: "An efficient adequate cause

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being found, must be considered the true cause, unless some other cause not incident to it, but independent of it, is shown to have intervened between it and the result." * * *[27]

SCHUMAKER v. ST. PAUL & D. R. CO.

(Supreme Court of Minnesota, 1891. 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.)

The complaint averred that the plaintiff was a car-repairer in defendant's employ, to whom the defendant owed a duty of furnishing transportation from a point along the line of the road where he had been sent to repair a wrecked caboose, to the city of St. Paul, which it failed to furnish, so that he was compelled to walk to the village of White Bear, nine miles distant, at night in extremely cold and dangerous weather and that, owing to his unpreparedness for exposure by reason of reliance on defendant's performance of its duty, he was made sick, contracted rheumatism and has been permanently injured.

COLLINS, J.[28] * * * The important question in this case, however, is whether, from the complaint, it appears that defendant is liable for the injuries which resulted from plaintiff's efforts to obtain shelter and food on the occasion referred to; the former, as before stated, arguing that, as alleged, they are too remote, and are not the proximate results of its act. * * * It must not be forgotten that the gravamen of the action is the negligence and carelessness of the defendant in leaving plaintiff at a place where he could not procure either shelter or food. It is an action in tort, and not for a breach of contract. It is the negligence of the defendant which is complained of, and not the breach of a contract to return the plaintiff to St. Paul when he had performed his labor. It was, of course, essential that the plaintiff's relation with the defendant be made to appear, for, unless he was a servant to whom the defendant owed a duty, there could arise no liability by reason of its neglect to perform that duty. The relation of master and servant first having been shown to exist, the law fixes the duty of the former towards the latter, and a violation of this duty is a wrong, not a breach of the contract. This, then, is an action in which

[27] The leading cases upon this question are Hobbs v. Railway Co., L. R. 10 Q. B. 111 (1875); McMahon v. Field, 7 Q. B. Div. 591 (1881); Pullman P. C. Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89 (1878); Murdock v. B. & A. R. R. Co., 133 Mass. 15, 43 Am. Rep. 480 (1882); Trigg v. St. L., K. C. & N. Ry. Co., 74 Mo. 147, 41 Am. Rep. 305 (1881); Cin., H. & I. R. R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179 (1884); and I., B. & W. R. v. Birney, 71 Ill. 391 (1874).

One placed in a position of peril should protect himself, and any injuries sustained in an attempt to do so are the proximate result of the wrongful act of the one who exposed him to the peril. Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346 (1845); Eastman v. Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677 (1862); Wilson v. Newport Dock Co., 4 Hurl. & C. 232 (1866).

[28] Part of the opinion is omitted, and the statement of facts is rewritten.

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the wrongdoer is liable for the natural and probable consequences of its negligent act or omission; the general rules which limit the damages in actions of tort being, in many respects, different from those in actions on contracts. The injury must be the direct result of the misconduct attributed, and the general rule in respect to damages is that whoever commits a trespass or other wrongful act is liable for all the direct injury resulting therefrom, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Dam. 130, note, and cases cited; Clifford v. Railroad Co., 9 Colo. 333, 12 Pac. 219, a case much like this. He who commits a trespass must be held to contemplate all the damages which may legitimately flow from his illegal act, whether he may have foreseen them or not; and, so far as it is plainly traceable, he must make compensation for the wrong. The damages cannot be considered too remote if, according to the usual experience of mankind, injurious results ought to have been apprehended. It is not necessary that the injury in the precise form in which it, in fact, resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. Hill v. Winsor, 118 Mass. 251.

The question is whether the negligent act complained of—leaving the plaintiff in the open country in the nighttime, in extremely cold and dangerous weather, a long distance from shelter or food—was the direct cause of the injuries mentioned in the complaint, or whether it was a remote cause, for which an action will not lie, and it must be taken for granted that the walk of nine miles and incident exposure brought about the alleged sickness, pain, and disability. There was no intervening independent cause of the injury, for all of the acts done by the plaintiff, his effort to seek protection from the inclement and dangerous weather, were legitimate, and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and lost his hands, or his feet, or perhaps his life, by freezing, no doubt could exist of the defendant's liability. It must not be permitted to escape the consequences of its wrong because the injuries were received in an effort to avoid the threatened danger, or because they differ in form or seriousness from those which might have resulted had the plaintiff made no such effort. An efficient, adequate cause being found for the injuries received by plaintiff, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened between it and the result. This is the substance of very clear statements of the law found in Kellogg v. Railway Co., 26 Wis. 223, 7 Am. Rep. 69, and in Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. And upon the point now under consideration we fail to distinguish between the case at bar and Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41—an action brought to recover for like damages said to have been caused by directing passengers to alight from a train at a place about three miles distant from their destination. At all events, the question

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as to what was the proximate cause of a plaintiff's injuries is usually one to be determined by a jury. As was said in Railway Co. v. Kellogg, supra, the true rule is that what is the proximate cause of an injury is ordinarily one for a jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it. * * *[29]

II. In Contract.

HADLEY et al. v. BAXENDALE et al.

(Court of Exchequer, 1854. 9 Exch. 341.)

The plaintiffs carried on an extensive business as millers at Gloucester; and on the 11th of May their mill was stopped by a breakage of the crank shaft, by which the mill was worked. The steam engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stop-

[29] See, also, Loeser v. Humphrey, post, p. 236; Watson v. Dilts, post, p. 453; McPeek v. W. U. Tel. Co., post, p. 267.

Among the great multitude of cases involving the rule, "Non remota causa, sed proxima, spectatur," the following in particular are instructive: Blythe v. D. & R. G. R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403 (1890); Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456 (1873); Hill v. Winsor, 118 Mass. 251 (1875); Lynn, G. & E. Co. v. Meriden F. I. Co., 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540 (1893); Christianson v. Railway Co., 67 Minn. 94, 69 N. W. 640 (1896); Dow v. Winnipesaukee, G. & E. Co., 69 N. H. 312, 41 Atl. 288, 42 L. R. A. 569, 76 Am. St. Rep. 173 (1898); Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234 (1822); Ryan v. N. Y. C. R. R. Co., 35 N. Y. 210, 91 Am. Dec. 49 (1866); Gilson v. D. & H. Canal Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802 (1892); Isham v. Dow, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691 (1898).

For typical illustrative cases from the English reports, see Cobb v. G. W. Ry., 1 Q. B. 459 (1893); Scholes v. N. L. Ry., 21 Law T. 835 (1870); City of Lincoln, 59 Law J. Prob. 1 (1889); Halestrap v. Gregory, 1 Q. B. 561 (1895); Randall v. Newson, 2 Q. B. Div. 102 (1877); Glover v. L. & S. W. Ry., L. R. 3 Q. B. 25 (1867); Burrows v. M., G. & C. Co., L. R. 7 Exch. 96 (1872); Burton v. Pinkerton, L. R. 2 Exch. 340 (1867); Sneesby v. L. & Y. Ry. Co., L. R. 1 Q. B. Div. 42 (1875); Wilson v Newport Dock Co., L. R. 1 Exch. 177 (1866); Priestly v. McLean, 2 Fost. & F. 288 (1860); Clark v. Chambers, 3 Q. B. Div. 327 (1878); Greenland v. Chaplin, 5 Exch. 243 (1850); Dixon v. Bell, 5 Maule & S. 198 (1816); Jordin v. Crump, 8 Mees. & W. 782 (1841); Illidge v. Goodwin, 5 Car. & P. 192 (1831); Lynch v. Nurdin, 1 Q. B. 29 (1841); Daniels v. Potter, 4 Car. & P. 262 (1830); Mangan v. Atterton, 4 Hurl. & C. 388 (1866); Hill v. N. R. Co., 9 Best. & S. 303 (1868); Clark v. Chambers, 3 Q. B. Div. 327 (1878); Thompson v. Hopper, 6 El. & Bl. 937 (1856).

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ped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken the answer was that if it was sent up by twelve o'clock any day it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2. 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made, to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25. damages beyond the amount paid into court by defendant, which was £25.

ALDERSON, B. We think that there ought to be a new trial in this case; but in so doing we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and in Blake v. Railway Co., 21 L. J. Q. B. 237, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at nisi prius. "There are certain established rules," this court says, in Alder v. Keighley, 15 Mees. & W. 117, "according to which the jury ought to find." And the court in that case adds: "And here there is a clear rule that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which

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would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now, the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the nonpayment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession, put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of

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contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

CORY v. THAMES IRONWORKS & SHIPBUILDING Co.

(Court of Queen's Bench, 1868. L. R. 3 Q. B. 181.)

The plaintiffs were coal merchants and ship owners, having a very large import trade in coal from Newcastle and other places into the port of London. The defendants were iron manufacturers and ship builders in London. The plaintiffs had introduced, at the docks where they discharged the cargoes of coal from their ships, a new and expeditious mode of unloading the coals by means of iron buckets, which were worked by hydraulic pressure over powerful cranes, and the plaintiffs' trade having considerably increased they were desirous of improving the accommodation offered in the discharge of their vessels by the above mode; this the defendants were not aware of.

The plaintiffs purchased the derrick for the purposes of their business, in order to erect and place in it, as they in fact did, large hydraulic cranes and machinery, such as they had previously used at the docks, and by means of these cranes to trans-ship their coals from colliers into barges without the necessity for any intermediate landing, the derrick, for this purpose, being moored in the river Thames, and the plaintiffs paying the conservators of the river a large rent for allowing it to remain there. The derrick was the first vessel of the kind that had ever been built in this country, and the purpose to which the plaintiffs sought to apply it was entirely novel and exceptional. No hull or other vessel had ever been fitted either by coal merchants or others in a similar way or for a similar purpose; and the defendants at the date of the agreement had notice that the plaintiffs purchased the derrick for the purpose of their business, considering that it was intended to be used as a coal store; but they had no notice or knowledge of the special object for which it was purchased and to which it was actually applied.

At the date of the agreement the defendants believed that the plaintiffs were purchasing the derrick for the purpose of using her in the way of their business as a coal store; but the plaintiffs had not at that time any intention of applying the derrick to any other purpose than

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the special purpose to which she was in fact afterwards applied. The plaintiffs in anticipation of the delivery of the hull in January, 1862, entered into a contract with Sir William Armstrong for the construction and delivery to them at a very heavy outlay of the necessary machinery for the purpose for which they purchased the hull, and in consequence of the delay in the delivery of the hull by the defendants the plaintiffs were prevented from taking delivery of the machinery from Sir William Armstrong, and the plaintiffs, on the 25th of July, 1862, paid Sir William Armstrong £3,000., the interest of which was lost to them. The plaintiffs also purchased, at a large cost, two steam tugs to be used, in conjunction with the hull, in towing the coal barges to and from the same, and which steam tugs were comparatively useless to the plaintiffs during the time in which the hull was undelivered, and the interest of the money expended on the same was lost to the plaintiffs; but none of the circumstances were known to the defendants.

If the defendants had delivered the hull to the plaintiffs in proper time the plaintiffs would have realized large profits by the use of it in the aforesaid manner, and they were put to great inconvenience and sustained great loss owing to their not having possession of the hull to meet the great increase in their trade. The plaintiffs also lost £8. 15s. for interest upon the portion of the purchase-money of the hull paid by them to the defendants before delivery.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover against the defendants the whole or any, and which of the above heads of damage?

J. Brown, Q. C., for the plaintiffs. J. D. Coleridge, Q. C., for the defendants.

COCKBURN, C. J. I think the construction which Mr. Coleridge seeks to put upon the case of Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with most mischievous consequences, because this would follow, that whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer; and it would be entirely in the power of the seller to break his contract with impunity. That would necessarily follow, if Mr. Coleridge's interpretation of Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, was the true interpretation. My Brother BLACKBURN has pointed out that that is not the true construction of the language which the court used in delivering judgment in that case. As I said in the course of the argument, the true principle is this, that although the buyer may have sustained a loss from the nondelivery of an article which he intended to apply to a special purpose, and which, if applied to that spe-

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cial purpose, would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and although, in point of fact, the buyer does sustain damage to that extent, it would not be reasonable or just that the seller should be called upon to pay it to that extent; but to the extent to which the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realized if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied. I think, therefore, that ought to be the measure of damages, and I do not see that there is anything in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, which at all conflicts with this.

BLACKBURN, J. I am entirely of the same opinion. I think it all comes round to this: The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the nonfulfilment of the contract, not more than that, but what might be reasonably expected to flow from the nonfulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz. that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the nonfulfilment of his contract. On the other hand, if the party has knowledge of circumstances which would make the damages more extensive than they would be in an ordinary case, he would be liable to the special consequences, because he has knowledge of the circumstances which would make the natural consequences greater than in the other case. But Mr. Coleridge's argument would come to this, that the damages could never be anything but what both parties contemplated; and where the buyer intended to apply the thing to a purpose which would make the damages greater, and did not intend to apply it to the purpose which the seller supposed he intended to apply it, the consequence would be to set the defendant free altogether. That would not be just, and I do not think that was at all meant to be expressed in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179. Here the arbitrator has found that what the defendants supposed when they were agreeing to furnish the derrick was that it was to be employed in the most obvious manner to earn money, which the arbitrator assesses at £420. during the six months delay; and, as I believe

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the natural consequence of not delivering the derrick was that that sum was lost, I think the plaintiffs should recover to that extent.

MELLOR, J. I am entirely of the same opinion. The question is, what is the limit of damages which are to be given against the defendants for the breach of this contract? They will be the damages naturally resulting, and which might reasonably be in contemplation of the parties as likely to flow, from the breach of such contract. It is not because the parties are not precisely ad idem as to the use of the article in question that the defendants are not to pay any damages. Both parties contemplated a profitable use of the derrick; and when one finds that the defendants contemplated a particular use of it as the obvious mode in which it might be used, I think as against the plaintiffs they cannot complain that the damages do not extend beyond that which they contemplated as the amount likely to result from their own breach of contract.

Judgment for the plaintiffs accordingly.[30]

HORNE v. MIDLAND RY. CO.

(Court of Common Pleas, 1872. L. R. 7 C. P. 583.)

The plaintiffs, who were under a contract to supply a quantity of military shoes to Hickson & Sons in London (for the use of the French army), at 4s. per pair, an unusually high price, to be delivered there by the 3d of February, 1871, sent the shoes to the defendants' station at Kettering in time to be delivered in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee; and the station-master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that, unless they were so delivered they would be thrown on their hands, but no notice was given to the defendants that the contract with Hickson & Sons was, owing to very exceptional circumstances, not an ordinary contract. The shoes not arriving in London until the 4th, Hickson & Sons rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1s. 3d. per pair—2s. 9d. per pair being the ordinary market value.

WILLES, J.[31] This case raises a very nice question upon the measure of damages to which a common carrier is liable for a breach of his contract to carry goods. It would seem that the damages which he is to pay for a late delivery should be the amount of the loss which in the ordinary course of things would result from his neglect. The ordinary consequence of the nondelivery of the goods here on the 3d of Febru-

[30] See, also, De Mattos v. G. E. S. S. Co., 1 Cababe & Ellis 489 (1885), and Berkey & Gay F. Co. v. Hascall, post, p. 549.

[31] Part of the opinion is omitted.

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ary would be that the consignee might reject them, and so they would be thrown upon the market generally, instead of going to the particular purchaser; and the measure of damages would ordinarily be in respect of the trouble to which the consignor would be put in disposing of them to another customer, and the difference between the value of the goods on the 3d and the amount realized by a reasonable sale. That prima facie would be the sum to be paid, in the absence of some notice to the carrier which would render him liable for something more special. These consequences would refer to the value of the goods at the time of their delivery to the carrier, the goods being consigned to an ordinary market and being goods in daily use and not subject to much fluctuation in price. In the present case, taking 2s. 9d. per pair as the value of the shoes, the ordinary damages would be the trouble the plaintiffs were put to in procuring some one to take them at that price, plus the difference, if any, in the market value between the 3d and the 4th of February. I find nothing in the case to shew that there was any diminution in the value between those days. The plaintiffs' claim, therefore, in that respect, would be covered by the £20. paid into court.

But they claim to be entitled to £267. 3s. 9d. over and above that sum, on the ground that these shoes had been sold by them at 4s. a pair to a consignee who required them for a contract with a French house for supply to the French army, which price he would have been bound to pay if the shoes had been delivered on the 3d of February. The special price which the consignee had agreed to pay was the consequence of the extraordinary demand arising from the wants of the French army; and the refusal of the consignee to accept the goods on the 4th was caused by the cessation of the demand for shoes of that character by reason of the war having come to an end. The market-price, therefore, we must assume, to have been 2s. 9d. a pair when the shoes were delivered to the carriers; and the circumstance which caused the difference was that the plaintiffs had had the advantage of a contract at 4s. a pair before the extraordinary demand had ceased. Was that, then, an exceptional contract? It was not, I take it, at the time the contract was entered into; but it was at the time the shoes were delivered to the carriers. The plaintiff sustained a loss of 1s. 3d. a pair on the 4,595 pairs of shoes which they failed to deliver in pursuance of their contract. It was, so to speak, a penalty thrown upon them by reason of the breach of contract. In that point of view, the contract was an exceptional one at the time the shoes were delivered to the carriers; and they ought to have been informed of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier, who is bound to accept the goods. It would be hard indeed if the law were to fix him

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with the further liability which is here sought to be imposed upon him, because he has received a notice which does not disclose the special and exceptional consequences which will or may result from a delayed delivery. I think the law in this respect has gone quite as far as good sense warrants. The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in Bulstrode—Everard v. Hopkins, 2 Bulst. 332—but the notion was corrected in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179. The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract. I go further. I adhere to what I said in Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499, at page 509, viz. that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." Was there any notice here that the defendants would be held accountable for the particular damages now claimed? In the ordinary course of things, the value of the shoes was 2s. 9d. a pair at the time they were delivered to the defendants to be carried. There was no change in their market value between the 3d of February and the 4th; and no notice to the carriers that the consignees had contracted to pay for them the exceptional price of 4s. a pair. The defendants had no notice of the penalty, so to speak, which a delay in the delivery would impose upon the plaintiffs. It would, as it seems to me, be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors if they did not reach the consignees by the 3d of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors, but were not communicated to the carriers at the time. * * *

GREBERT-BORGNIS v. J. & W. NUGENT.

(Court of Appeal, 1885. L. R. 15 Q. B. Div. 85.)

BRETT, M. R.[22] * * * The plaintiff came over and saw the defendants in this country, and informed them that he was about to complete or had completed a contract with a French customer in Paris, and that he wished the defendants to supply skins which would enable him to fulfill the contract with his Paris customer; and that he would send them the particulars for that purpose. Therefore, when the plaintiff sent over to the defendants the order to manufacture and deliver skins of different specialties as to quality and shape and other matters, at different prices, and to be delivered in lots at different

[22] Part of the opinion is omitted.

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times, it corresponded in truth with a contract which at that time was then in contemplation if not complete in fact with the French customer and the defendants really knew as matter of business and for all practical purposes that the contract which the plaintiff had made with the French customer was substantially the same which he was making with the defendants, though of course with this difference, that, as a matter of business, the plaintiff would be selling to the Frenchman at a price greater than that which he was giving to the defendants. That is the extent of the knowledge which the defendants had of the contract by the plaintiff with his French customer. It is not the case of a merchant ordering goods from the manufacturer here to be sent and resold abroad, which of itself would tell the manufacturer that the order was for goods to be resold at a profit. It is more than that. It is, that he, the plaintiff, was under a specific and particular contract with a particular person, and that the skins were to enable the plaintiff to fulfil that contract.

Now, the defendants broke their contract with the plaintiff, and thereby disabled the plaintiff from fulfilling his contract, beyond a certain amount, with the French customer. Now, what were the damages to which, under those circumstances, the plaintiff was entitled? There was no market for these goods. If there had been a market for them, what the plaintiff would have been bound to do would have been to go into the market and buy the goods and so supply his French customer; and if the market price was above the contract price he would get the difference from the defendants. There was no market, therefore the first head of damage is perfectly clear; he lost the profit of 5 francs per skin which he otherwise would have made. This has not been disputed by the learned counsel on behalf of the defendants, and, therefore, the plaintiff's right to the £34. is practically admitted.

But when the plaintiff says, "I have in fact not only lost the profit which I should have made, but I have been made to pay £28. more on account of my breach of contract with my French customer." Then comes the question, can he recover from the defendants that sum or any loss in respect of damages which he has had to pay to his French customer?

Now, the cases which have been cited are supposed to be cases which carry out the principle laid down in Hadley v. Baxendale, 9 Exch. 341, 23 L. J. (Exch.) 179. And what I take to be the result of them is this: Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must shew that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such subcontract was not made known to him at all the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods,

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then the subcontract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to shew what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value.

But where the subcontract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his subcontract.

Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the subcontract as was made known to him. If he were told, for instance, that the contract was that if I do not supply my purchaser with the goods which I am ordering for him, my vendor, I shall have to pay my purchaser £4. a ton for every ton which I do not deliver, then, if there be a breach of the contract, the original vendor would have to pay the £4. a ton. But supposing there was in the subcontract between myself and my purchaser not only a stipulation that I should pay £4. a ton, but, besides that, I should be liable to a penalty of £5. a day, although that is in the subcontract, yet if that part of it was not made known to the original vendor, then for that reason and because it is not a natural consequence of his bargain, he would not be liable to pay the penalty of £5. a day. It seems to me that the cases establish that the original vendor is to be liable to so much of the subcontract as was made known to him, but only to that extent. * * *

Judgment for £62. affirmed.

SMEED v. FOORD.

(Court of Queen's Bench, 1859. 1 El. & El. 602.)

The defendant, on July 28, 1856, sold and agreed to deliver to the plaintiff, a farmer, a threshing machine and engine by August 14, 1856. The plaintiff's wheat was ready for threshing on such date, and his custom, as defendant knew, was to thresh his wheat in the field. The machine was not delivered until September 14th. In the meantime, the wheat had become much deteriorated by exposure to wet weather and had to be cut and stacked. On receipt of the machine, the plaintiff immediately threshed. It was then found necessary to dry the wheat in a kiln, and a sale was had at a lower price than would have been obtained in August, as the market price of wheat had fallen.

LORD CAMPBELL, C. J. In this case there was an express contract that the machine should be delivered on a fixed day. It was not,

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in fact, delivered till long after that day. And the question is, whether the plaintiff is entitled, in consequence, to recover substantial or only nominal damages. The rule upon this subject is to be found in Hadley v. Baxendale, 9 Exch. 341, where it is laid down, in accordance with the Code Napoléon, with Pothier, with Chancellor Kent, and with all other authorities, that the damages which one party to a contract ought to receive, in respect of a breach of it by the other, are such as either arise naturally, that is, in the usual course of things, from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. I do not say how far this rule was applicable to the particular circumstances of that case; but, as an abstract rule of law, I think it is correct. Applying it to the facts of the present case, we must hold that the plaintiff is entitled to recover all losses which naturally arose, or which were contemplated by him and the defendant as likely to arise, from the delay in the delivery of the machine. Now the plaintiff, a large farmer, known to the defendant to be such, wanted a machine to thresh his wheat: the defendant agreed to supply him with one on 14th August 1856, about the time when wheat would be expected to be ripe. The defendant knew that the plaintiff required the machine for the purpose of threshing wheat in the field. Then, was it not contemplated by the parties, that if the machine was not delivered by the time fixed, damage to the wheat would, in all probability, be the result; particularly in such a variable climate as this? Owing to the nondelivery of the machine, the wheat was stacked, and afterwards damaged by the rain which ensued. This injury, and the loss and expense which it involved, were the natural results of the defendant's delay. They were also results which the parties must have foreseen. But it is said that the plaintiff ought to have hired or borrowed another machine. Had it been proved that he could have done so, the case might have been different. No such evidence, however, was given. On the other hand, there was evidence that the plaintiff did apply for a machine in one quarter, but in vain. Moreover, the defendant led him on from day to day to suppose that the machine which he had ordered would be speedily delivered to him. The plaintiff, therefore, being in no default, I think that he is entitled to substantial damages in respect of all those items of loss which resulted from the fall of rain. He is not, however, in my opinion, entitled to any damages in respect of the fall in the market price of the wheat; for that could not have been in the contemplation of the parties when the contract was made; nor can it be said to have been in any way the natural result of the defendant's breach of contract. For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen.[33]

[33] Erle, J., in Randall v. Raper, El., Bl. & El. 84 (1858), said:
"The question is, what amount of damages is to be given for the breach of this warranty? The warranty is, that the barley sold should be chevalier

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LEONARD v. NEW YORK, A. & B. ELECTRO-MAGNETIC TELEGRAPH CO.

(Court of Appeals of New York, 1870. 41 N. Y. 544, 1 Am. Rep. 446.)

On September 24, 1856, Magill & Pickering, acting for plaintiffs, delivered to the Western Union Company at Chicago, a dispatch to be sent to Oswego, as follows: "D. B. Staats, Oswego: Send 5,000 sacks of salt immediately. Magill & Pickering." The dispatch was sent by the Western Union Company to Buffalo, and there delivered to the agent of the defendants. It was transmitted by the defendants over their line to Syracuse; and in transcribing it at this point for the purpose of delivering to the Oswego line, the agent of defendants negligently wrote the word "casks" in place of "sacks," so that when the message was delivered to the Oswego line, and by that line to Staats, it read as follows: "D. B. Staats, Oswego: Send 5,000 casks of salt immediately. Magill & Pickering."

The term "sacks" in the salt trade designates fine salt in sacks containing fourteen pounds, and the term "casks" designates coarse salt in packages containing not less than three hundred and twenty pounds.

Staats received the telegram on the afternoon of September 24, 1856, and that evening or the next morning, chartered the schooner S. H. Lathrop, to take the salt to Chicago, and shipped by her $2{,}733^{200}/_{280}$ barrels of coarse salt. The cargo of salt arrived at Chicago on Oct. 15. There was no market for it at Chicago, and Magill & Pickering stored it at the expense of the plaintiffs until 1857, when it was sold

barley. The natural consequence of the breach of such a warranty is that, the barley which has been delivered having been sown and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty; and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley; that is not inconsistent with Hadley v. Baxendale, 9 Exch. 341. But then it is said that here the plaintiffs have made no actual payment; so that, if they recovered such damages in this action, they might put them into their own pockets without paying the subvendees. But I think that the true rule is that a liability to loss is sufficient to give the party liable a title to recover."

Subsequent English cases involving the principle of Hadley v. Baxendale are, among others, in addition to those reprinted herein, Jameson v. Midland Ry. Co., 50 Law T. 426 (1884); Schulze & Co. v. G. E. Ry., L. R. 19 Q. B. Div. 30 (1887); Thol v. Henderson, 8 Q. B. Div. 457 (1881); Candy v. Midland Ry. Co., 38 Law T. 226 (1878); Skinner v. City of L. M. I. Co., L. R. 14 Q. B. Div. 882 (1885); Welch v. Anderson, 61 L. J. Q. B. 167 (1891); Simpson v. L. & N. W. Ry., 1 Q. B. Div. 274 (1876); Wilson v. G. I. S. C. Co., 47 L. J. Q. B. 239 (1877); Wilson v. Newport Dock Co., L. R. 1 Exch. 177 (1866); Gee v. Lancashire & Y. Ry. Co., 6 Hurl. & N. 211 (1860); Hobbs v. L. & S. W. Ry. Co., L. R. 10 Q. B. 111 (1875); Hammond & Co. v. Bussey, 20 Q. B. Div. 79 (1887); Portman v. Middleton, 4 C. B. (N. S.) 322 (1858); Walker v. Moore, 10 B. & C. 416 (1829); B. C. S. M. Co. v. Nettleship, L. R. 3 C. P. 499 (1868); Hinde v. Liddell, L. R. 10 Q. B. 265 (1875); Elbinger-Actien-Gesellschaft v. Armstrong, L. R. 9 Q. B. 473 (1874); Borries v. Hutchinson, 18 C. B. (N. S.) 445 (1865).

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for less than one dollar per barrel. The salt was worth at the time of its shipment in Oswego, $1.60 per barrel.[34]

EARL, C. J.[35] * * * It is also claimed that the referee adopted an erroneous rule of damages, and that the plaintiffs should not in any event have recovered more than they actually disbursed for freight on the salt to Chicago. The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in the courts. The difficulty is not so much in laying down general rules, as in applying them. The cardinal rule undoubtedly is, that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts. In this case then, in what may properly be called the fiction of law, the defendant must be presumed to have known that this dispatch was an order for salt, as an article of merchandise, and that the plaintiff would fill the order as delivered; and that if the salt was shipped to Chicago, it would be shipped there as an article of merchandise, to be sold in the open market. And the market price in Chicago being less than the market price in Oswego, that they would lose the cost of transportation, and the difference between the market price at Chicago and the market price at Oswego. I think therefore that the rule of damages adopted by the referee was sufficiently favorable to the defendant. The damages al-

[34] The statement of facts is abridged from that of the original report.

[35] Only a part of the opinion of Earl, C. J., is here given. The opinions of the other judges are omitted.

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lowed were certain, and they were the proximate, direct result of the breach.

I do not think, under the facts of this case, that the plaintiffs, when they found the state of the Chicago market, were bound to re-ship this salt to Oswego. For any thing that appears in this case, the cost of transportation to Oswego would have been equal to the difference in the market price between the two places. Then there was the risk of the lake transportation at that season of the year, and the uncertainty in the Oswego market when the salt should again be landed there. If the plaintiff had shipped it, and it had been lost upon the lake, the total loss would not have been chargeable to the defendant. By the wrongful act of the defendant, the salt had been placed in Chicago, one of the largest commercial centers in the country, and the plaintiffs had the right to sell it there in good faith, and hold the defendant liable for the loss. * * *

BOOTH v. SPUYTEN DUYVIL ROLLING MILL CO.

(Court of Appeals of New York, 1875. 60 N. Y. 487.)

Action against the Spuyten Duyvil Rolling Mill Company for breach of a contract to make and deliver by a certain date a quantity of steel caps for rails. At the time of making the contract, defendant was informed that the caps were to be used in making rails to fill a contract which plaintiff had made with the New York Central Railroad Company, but defendant was not informed as to what price plaintiff was to receive for the rails. Both parties knew that the caps could not be procured elsewhere in time to fill the sub-contract. The caps alone had no market value. Defendant's mill was burned before the time for furnishing the caps had expired, and they were never furnished.

CHURCH, C. J.[36] * * * Prior to the contract with the defendant, the plaintiff had contracted with the New York Central Railroad Company to sell and deliver to it by the 1st of June, four hundred tons of rails to be composed of an iron foundation and steel caps, for the invention of which the plaintiff had obtained a patent; and that when the contract was made with the defendant he informed it that he wanted the caps to perform the contract; that if they had been delivered by the 1st of April the plaintiff could have performed his contract; and he finds, also, facts showing that the plaintiff would have realized the amount of profits for which the recovery was ordered.

The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the nonperformance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent. It is presumed that the parties contemplate the usual natural consequences of a breach

[36] Part of the opinion is omitted.

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when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly. For a breach of an executory contract to sell and deliver personal property the measure of damages is, ordinarily, the difference between the contract price and the market value of the article at the time and place of delivery; but if the contract is made to enable the plaintiff to perform a subcontract, the terms of which the defendant knows, he may be held liable for the difference between the subcontract price and the principal contract price, and this is upon the ground that the parties have impliedly fixed the measures of damages themselves, or rather made the contract upon the basis of a fixed rule by which they may be assessed. The authorities cited on both sides recognize these general rules. * * *

The difficulty is in properly applying general rules to the facts of each particular case. Here it is found in substance that the contract was made to enable the plaintiff to perform his contract with the railroad company, and that this was known to the defendant. It is insisted however that as the price which the railroad company was to pay the plaintiff for the rails was not communicated to the defendant it cannot be said that it made the contract with reference to such price. It is expressly found that there was no market price for the steel caps, and it does not appear that there was any market price for the completed rail. The presumption is, from the facts proved, that there was not. It was a new article, and the contract was made to bring it into use. The result of the able and elaborate argument of the learned counsel for the defendant is, that in such a case, that is when, although the contract is made with reference to and to enable the plaintiff to perform a subcontract, yet if the terms of the subcontract, as to price, are unknown to the vendor, and there is no market price for the article, the latter is not liable for any damages, or what is the same thing, for only nominal damages. I have examined all the authorities referred to, and I do not find any which countenances such a position, and there is no reason for exempting a vendor from all damages in such a case. It is not because the vendee has not suffered loss, as he has lost the profits of his subcontract; it is not because such profits are uncertain, as they are fixed and definite, and capable of being ascertained with certainty; it is not because the parties did not contract with reference to the subcontract, when it appears that the contract was made for the purpose of enabling the vendee to perform it. If the article is one which has a market price, although the subcontract is contemplated, there is some reason for only imputing to the vendor the contemplation of a subcontract at that price, and that he should not be held for extravagant or exceptional damages provided for in the subcontract. But the mere circumstance that the vendor does not know the precise price specified in the contract will not exonerate him entirely. He

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cannot in any case know the precise market price at the time for performance. Knowledge of the amount of damages is impracticable, and is not requisite. It is only requisite that the parties should have such a knowledge of special circumstances, affecting the question of damages, as that it may be fairly inferred that they contemplated a particular rule or standard for estimating them, and entered into the contract upon that basis. In Hadley v. Baxendale, 9 Exch. 341, which is a leading case on the subject in the English courts, the court after speaking of the general rule, says: "If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances, so known and communicated."

This case has been frequently referred to, and the rule as laid down somewhat criticised; but the criticism is confined to the character of the notice, or communication of the special circumstances. Some of the judges, in commenting upon it, have held that a bare notice of special consequences which might result from a breach of the contract. unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the views expressed in these cases; and I do not think the court in Hadley v. Baxendale, intended to lay down any different doctrine. Upon the point involved here, whether the defendant is exempted from the payment of any damages when there is no market price, and the price in the subcontract is not known, there is no conflict of authority that I have been able to discover. In the first place, there is considerable reason for the position that where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a subcontract, and knows that there is no market price for the article, he assumes the risk of being bound by the price named in the subcontract, whatever that may be, but it is unnecessary to go to that extent. It is sufficient to hold, what appears to me to be clearly just, that he is bound by the price, unless it is shown that such price is extravagant, or of an unusual and exceptional character. The presumption is, that the price at which the property was sold was its fair value, and that is to be taken as the market price for the purpose of adjusting the damages in the particular case. This presumption arises here. The profits were not unreasonable, certainly not extravagant. About fifteen per cent. was allowed for profits, including the use of the patent, and no evidence was offered, or claim made, that the price was not the fair value of the article. We must assume that it was, and hence within the contemplation of the parties. The case of Borries v. Hutchinson, 114 E. C. L. 443, is quite analogous to this. The article, caustic soda, was purchased to be sold to a foreign correspondent, which the defendant knew. There were several items of damage claim-

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ed. The profits on the subcontract were conceded, and the money paid into court, but the court held, in passing judgment, that the plaintiff was entitled to recover such profits. Erle, C. J., said: "Here the vendor had notice that the vendee was buying the caustic soda, an article not ordinarily procurable in the market, for the purpose of resale to a sub-vendee, on the continent. He made the contract, therefore, with the knowledge that the buyers were buying for the purpose of fulfilling a contract which they had made with a merchant abroad."

The case of Elbinger v. Armstrong, L. R. 9 Q. B. 473, also illustrates the rule. That was a contract for the purchase of six hundred and sixty-six sets of wheels and axles, which the plaintiff designed to use in the manufacture of wagons; and which he had contracted to sell and deliver to a Russian company by a certain day, or forfeit two roubles a day. The defendant was informed of the contract, but not of the amount of penalties. Some delay occurred in the delivery, in consequence of which the plaintiff had to pay £100. in penalties, and the action was brought to recover that sum. There was no market in which the goods could be obtained, and the same point was made there as here, that the plaintiff was only entitled to nominal damages; but the court says: "When from the nature of the article, there is no market in which it can be obtained, this rule (the difference between the contract and market value) is not applicable, but it would be very unjust if, in such cases, the damages must be nominal."

It is true that the court held that the plaintiff could not recover the penalties as a matter of right, mainly upon the ground that such a consequence was not, from the nature of the notice, contemplated by the parties; and yet the judgment, directing the amount of the penalties paid, was allowed to stand, as being a sum which the jury might reasonably find. Cory v. Iron Works Co., L. R. 3 Q. B. 181, decided that when the article purchased was designed by the purchaser for a peculiar and exceptional purpose unknown to the seller, the latter was nevertheless liable for the damages which would have been incurred if used for the purpose which the seller supposed it would be used for.

The case of Horner v. Railway Co., L. R. 8 C. P. 134, is not in conflict with the position of the plaintiff. In that case the article had a well-known market value. The subcontract was at an unusual and extravagant price, of which the defendant was not informed. Besides, the defendant was a carrier, and it was seriously doubted by some of the judges whether the same rule would apply to a carrier as to a vendor. The question in all these cases is, what was the contract? and a carrier who is bound to take property offered at current rates would not, perhaps, be brought within the principle by a notice of ulterior consequences, unless such responsibility was sought to be imposed as a condition, and he have an opportunity to refuse the goods; or unless a special contract at increased rates was shown. The decision was placed upon the ground that the exceptional price was not within the contemplation of the parties. The authorities in this state support the

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doctrine of liability in a case like this. The cases of Griffin v. Colver [16 N. Y. 489, 69 Am. Dec. 718] and Messmore v. Lead Co., supra [40 N. Y. 422], especially the latter, decide the same principle. The defendant in that case was informed of the price of the subcontract, but the decision was not put upon that ground. This case presents all the elements which have been recognized for the application of the rule of liability. The plaintiff contracted with the defendant expressly to enable him to perform his contract with the railroad company, which the defendant knew. The goods could not have been obtained elsewhere in time; and in consequence of the failure of the defendant to perform his contract, the plaintiff lost the benefit of his subcontract. It is not claimed that the price at which the completed rails were agreed to be sold was extravagant or above their value; and as there was no market price for the article, the fact that the defendant was not informed of the precise price in the subcontract does not affect its liability. Nor does the fact that the defendant's contract does not embrace the entire article resold, relieve it from the consequences of nonperformance. It was a material portion of the rail, without which it could not be made; and solely by reason of the failure of the defendant, the plaintiff failed to perform his contract, and thereby lost the amount for which he has recovered. * * *

Judgment, allowing recovery for profits lost, affirmed.

GUETZKOW BROS. CO. v. ANDREWS et al.

(Supreme Court of Wisconsin, 1896. 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909.)

The action was brought to recover the price of showcases and of articles manufactured for the defendants by the plaintiffs. The goods were manufactured for a special purpose, namely, to enable defendants to carry out a contract previously made by them to supply such goods to exhibitors at the World's Fair in Chicago in 1893. The amounts that defendants were to receive from such exhibitors were in advance over plaintiff's price of 100 to 150 per cent. The defendants sought to counterclaim as to damages which they asserted they had sustained by reason of the failure of plaintiffs to construct the articles in accordance with the contract, whereby defendants lost the profits on such subcontracts.

MARSHALL, J.[37] * * * There is no controversy but that the difference between the contract price for the goods to appellants and what they were to receive was unusually large. To say that such increased price to the exhibitors was extraordinary, in a superlative degree, would be fully justified. It also appears beyond controversy that respondent's officers knew, when the contract was made with appel-

[37] Part of the opinion is omitted, and the statement of facts is rewritten.

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lants, that the goods were intended for a special purpose. They had reason to know that there was no established market price for such goods. They knew that defendants were under contract to furnish the goods to the exhibitors, but it does not appear that they had any notice of the contract price such exhibitors were to pay; and it is in the light of these facts that we must determine the question presented. * * *

Where there has been a previous sale, or where there has not, the fundamental principle to be observed is that the damages for the breach complained of must be confined to such as may be fairly considered to arise, according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of the parties at the time of making the contract as the probable result of the breach of it. Hadley v. Baxendale, 9 Exch. 341; Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. 49. Hence, it is held that, in order to make applicable the special rule of damages,—that is, loss of profits,—it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home. * * *

But the question arises whether the price to the first vendee must be communicated to the second vendor in order that he may be charged with the special rule of damages at the suit of his vendee, in case of a breach on the part of such second vendor; and upon the precise point here presented the authorities are not numerous. In Cockburn v. Lumber Co., supra, Mr. Justice Lyon said: "To bind the defendant by a price stipulated for on a resale, he must have had notice of such resale when the contract was made, though, perhaps, not of the contract price." But it must be observed that, in the case then under consideration, the circumstance of extraordinary profits was not present; that is, the evidence did not disclose but that the profits were such as were reasonable, and might reasonably have been in contemplation by both parties to the transaction when the contract was made. The question has been many times considered in the courts of England, and may be said to have been long settled, that the second vendor is only bound by the terms of the contract with the second vendee, so far as communicated to him, or he had reasonable ground to know the same, by inference from facts brought to his knowledge. All of the cases refer to and are founded upon the general principle laid down in Hadley v. Baxendale. * * *

Differences may be found in the interpretations which courts have put on the rule of Hadley v. Baxendale; but they generally hold that the price in the first contract need not be communicated, as intimated in Cockburn v. Lumber Co., in this court. They proceed upon the principle, all of them, that knowledge of the first contract is sufficient to bring home to the second vendor, as an inference of fact, knowl-

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edge that the price in the first contract is sufficiently in advance of the price in the second contract to allow a reasonable profit to the second vendee. We venture to say that no case can be found, where the price was out of all proportion to anything that might be considered reasonable in order to give a fair profit, that the court has held that such unreasonable profits may be recovered as damages, where knowledge of such unreasonable profits, as a special circumstance, was not known to both parties at the time of the making of the contract. The most that is held in Booth v. Mill Co., 60 N. Y. 487, cited with confidence by appellants, is that the second vendor is bound by the price his vendee is to receive, unless it is shown that such price is extravagant, or of an unusual or exceptional character. That is as far as the New York courts have gone. Church, C. J., said: "There is considerable reason for the position that, where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a previous contract, and he knows there is no market price for the article, he assumes the risk of being bound by the price named in such previous contract, whatever it may be." But no such rule was adopted, and no case was there cited to support such a rule, and we are unable to see wherein such reason exists. It could only be consistent with the theory that the law aims at complete compensation for all losses, including gains prevented as well as losses sustained, without the important condition, requisite to give the rule the basic foundation upon which all rules for the assessment of damages are supposed to rest, that of natural justice, which condition must always be considered in order that the true rule may be correctly stated. That is, that the damages must be such as can be fairly supposed to have entered into the contemplation of both parties. * * *[38]

Judgment for plaintiff affirmed.

SHERROD v. LANGDON.

(Supreme Court of Iowa, 1866. 21 Iowa, 518.)

Plaintiffs seek to recover damages resulting, as they allege, from the purchase by them of defendants of a certain lot of sheep. In one count it is alleged that the sheep were warranted sound, in the other that they were represented to be free from any disease, and especially such as "foot-rot" and "scab"; that this was false, etc. Upon issue joined, there was a trial. Verdict for plaintiff, judgment thereon, and defendant appeals.

[38] That loss of profit on a resale is not an element of the allowance for damages, see Williams v. Reynolds, 6 Best & S. 495 (1865); (contra, Dunlop v. Higgins, 1 H. L. Cas. 381 [1848], in Scotland), excepting where no other basis of admeasurement exists, as where the article is not obtainable in the market (France v. Gaudet, L. R. 6 Q. B. 199 [1871]; McHose v. Fulmer, 73

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WRIGHT, J.[39] * * * Plaintiffs had, at the time of purchasing these sheep, other sheep, and these, as they claim, became diseased and died because of the "foot-rot" and "scab" imparted to them by the unsound sheep so sold to them by defendants, without fault, etc. The injury to these sheep so owned prior to this purchase, under the instructions, entered as an element in the damages recovered by plaintiffs.

And now the point made is, that this was improper unless defendants knew at the time of such sale that plaintiffs had other sheep. It is not claimed that such damages would not be the natural consequences of defendants' (fraudulent) act, and as such properly recoverable in this action; but the claim is, that this could only be so upon the theory that defendants knew that plaintiffs had other sheep to be infected by the diseases named.

Upon principle this position is not sustainable. Plaintiffs were entitled to recover all the damages of which the act complained of was the efficient cause. The loss of the sheep sold in consequence of their unsound condition was the natural and usual consequence of the act. The other damages were special and peculiar, and they were set forth specifically by the pleader. And upon the assumption that plaintiffs used the care and diligence required at their hands, what matters it whether defendants knew that they had other sheep or not? Or what difference would it make if plaintiff, in ignorance of the unsound condition of these sheep, had afterward bought other sheep, which they lost by reason of the disease communicated to them by those bought of defendants? Defendants sold the sheep with the knowledge that plaintiffs had a right to and probably would place them upon their farm; and, if guilty as charged, they would be held liable for the damages naturally and reasonably resulting from such act. It is known as a matter of fact, that most farmers in this state do keep sheep, and nothing is more important to their success than to secure good, sound flocks. If one lot is procured, there is no duty to refrain from purchasing others, lest those purchased may be unsound, and thus all be lost. But the guarantor, or party making the false representations, sells with a knowledge that his purchaser may have or may purchase other sheep, and cannot screen himself from the consequences of his act upon the ground of ignorance. As well might he sell a weapon dangerous and "infernal" in its structure, representing it to be harmless, and nothing more than a desirable improvement in firearms, and then escape liability for injury to the purchaser's home or family on the ground that he did not know that he had either. The ground

Pa. 365 [1873]; Trigg v. Clay, post, p. 344) or unless there be knowledge on the part of the vendor of the existence of subcontracts by the vendee (Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521 [1896]).

See, also, Thol v. Henderson, 8 Q. B. Div. 457 (1881); Borries v. Hutchinson, 18 C. B. (N. S.) 445 (1865); Cort v. Ambergate, 17 Q. B. 127 (1851); Hydraulic E. Co. v. McHaffie, 4 Q. B. Div. 670 (1878).

[39] Part of the opinion is omitted.

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of the recovery is, that the loss actually happened while defendants' wrongful act was in operation—a loss attributable to their wrongful or fraudulent act, and it is not for them to say, we did not know plaintiffs had other sheep, and hence did not contemplate or undertake to be liable for so great a loss. * * *[40]

HAMMER v. SCHOENFELDER.

(Supreme Court of Wisconsin, 1879. 47 Wis. 455, 2 N. W. 1129.)

COLE, J.[41] The only question in this case relates to the rule of damages for the failure of the defendant to supply ice according to his contract. The plaintiff was a butcher by trade, and the defendant undertook and agreed to furnish him with what ice he might require for his ice box, in which he kept fresh meat, at a stipulated sum, for the season of 1878.

About the last of July the defendant stopped supplying ice, and refused any longer to furnish the plaintiff with ice for his box. In consequence the plaintiff lost considerable fresh meat, which spoiled for want of ice. The defendant had supplied the plaintiff with ice the previous season, and well understood the use to be made of the ice which he contracted to deliver. Nothing was paid by the plaintiff on the contract. * * *

Of course this was an action for a breach of the contract, but as the defendant fully knew the use which the plaintiff wished to make of the ice he agreed to deliver, namely, to supply his ice box in order to preserve fresh meat, there is no hardship in allowing the plaintiff to recover "not only general damages—that is, such as are the necessary and immediate result of the breach—but special damages, which are such as are the natural and proximate consequence of the breach, although not in general following as its immediate effect." * * *

Now, as the defendant was acquainted with all the special circumstances in respect to this contract—knew for what purpose the ice

[40] Erle, J., in Mullett v. Mason, L. R. 1 C. P. 559 (1866), said:

"The plaintiff bought a cow of the defendant who warranted it sound, though at the time it had the cattle plague; the breach of warranty, therefore, is undoubted. But the plaintiff also complains that the defendant fraudulently represented to him that it had no infectious disease while he knew that it had. I do not stop to inquire what would have been the measure of damages if there had only been the warranty, because it is clear that if a seller makes a fraudulent representation to a buyer to induce him to buy, the buyer has a right to act upon it as if it were true, and if he does so the seller must compensate him for all the direct consequences that naturally follow from it. In the present case, therefore, the defendant is liable for all the direct consequences of the plaintiff treating the cow as if it was free from any infectious disease, and placing it, as he naturally would, with other cattle, and the death of the other cows was a direct consequence of his doing that."

Accord: Knowles v. Nunns, 14 Law T. (N. S.) 592 (1866), and Smith v. Green, 1 C. P. Div. 92 (1875).

[41] Part of the opinion is omitted.

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agreed to be furnished by him was to be used—he should fully indemnify the plaintiff for the loss he sustained by non-delivery of the ice, and he was, therefore justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere. This is a legitimate element to be considered in estimating the plaintiff's damages. It is a consequence which "may reasonably be supposed to have been in the contemplation of both parties, at the time of making of the contract, as the probable result of the breach of it." * * *[42]

PRIMROSE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of United States. 1894. 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883.)

On June 16, 1887, the plaintiff wrote and delivered to the defendant, at Philadelphia, for transmission to his agent, William B. Toland, at Ellis, in the state of Kansas, a message:

"To Wm. B. Toland, Ellis, Kansas:

"Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases.

"Frank J. Primrose."

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form:

"To W. B. Toland, Waukeney, Kansas:

"Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase.

"Frank J. Primrose."

The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics.

"[Despot] *Destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase[s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows:

"Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds;

[42] Hadley v. Baxendale, ante, p. 189, is so obviously the leading case upon this subject that all other cases therein will be found to be largely commentaries thereon. Among other important American cases are Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 (1858), herein in part, post, p. 245; Little v. B. & M. R. R., 66 Me. 239 (1876); Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356 (1874); Swift v. E. W. Co., 86 Ala. 294, 5 South. 505 (1888); Smith v. Flanders, 129 Mass. 322 (1880); Jones v. George, 61 Tex. 345, 48 Am. Rep. 280 (1884); McHose v. Fulmer, 73 Pa. 365 (1873). And see, elsewhere in this volume, Jordon v. Patterson, ante, p. 210, note; Harvey v. C. & P. R. R. Co., post, p. 610; Trigg v. Clay, post, p. 344.

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perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] *purchase*."

The plaintiff testified that he then was, and for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business, and early in June, 1887, sent him out to Kansas and Colorado, with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June 12th, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity he did not know; that he had frequently sent messages for him, and considered him one of his best customers during the wool season. The plaintiff also introduced evidence to show that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool; and that the plaintiff, in settling with the sellers thereof, suffered a loss of upwards of $20,000.[43]

GRAY, J.[44] * * * Under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. * * *

In Telegraph Co. v. Gildersleve, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the Court of Appeals of Maryland, and applying the rule of Hadley v. Baxendale, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars by those not initiated; and, if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself

[43] This statement is abridged from that of the official report.

[44] Part of the opinion is omitted.

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against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251, 96 Am. Dec. 519.

In Baldwin v. Telegraph Co., which was an action by the senders against the telegraph company for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the court of appeals of New York, said: "The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a nondelivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, whether for the sale or carriage of goods or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the nonperformance." "The dispatch not indicating any purpose other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an undervalue, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would naturally and necessarily result from the failure to deliver the message would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752, 6 Am. Rep. 165. See, also, Hart v. Cable Co., 86 N. Y. 633.

The Supreme Court of Illinois, in Tyler v. Telegraph Co., above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434, 14 Am. Rep. 38. And in the recent case of Cable Co. v. Lathrop the same court said: "It is clear enough that, applying the rule in Hadley v. Baxendale, supra, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that

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to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying that it can contain no information of value as pertaining to a business transaction, and a failure to send it or a mistake in its transmission can reasonably result in no pecuniary loss." 131 Ill. 575, 585, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. * * *

In the present case the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the Circuit Court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. Judgment affirmed.

FULLER, C. J., and HARLAN, J., dissented.

SANDERS et al. v. STUART.

(Court of Common Pleas, 1876. 1 C. P. Div. 326.)

Lord COLERIDGE, C. J.[45] The plaintiffs in this case were merchants in this country; the defendant a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message, in words by themselves, entirely unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendant, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction.

[45] Part of the opinion is omitted.

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The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain the verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in Hadley v. Baxendale, 9 Ex. 341, 23 L. J. Ex. 179, and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in Hadley v. Baxendale, 9 Ex. 341, 23 L. J. Ex. 179, applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be "reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it," for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz. the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can "fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from the breach" of such a contract as this. * * *

WESTERN UNION TELEGRAPH CO. v. WILSON.

(Supreme Court of Florida, 1893. 32 Fla. 527, 14 South. 1, 22 L. R. A. 434, 37 Am. St. Rep. 125.)

The plaintiff delivered to the defendant company for transmission from Pensacola to Liverpool the following cipher message: "Dobell, Liverpool: Gladfulness, shipment, rosa—bonheur—luciform—baneworth—margin"—which, being interpreted, was an order upon plaintiff's agent, Dobell, to sell a cargo of lumber and timber then in Pensacola. The message was not delivered. The plaintiff alleges a loss of $630.84 by reason of the default of defendant.*

TAYLOR, J.[46] * * * The question presented is, what is the proper measure of damages to be recovered of a telegraph company holding

*The statement of facts has been rewritten.

[46] The opinion of Raney, C. J., and parts of the opinions of Taylor and Mabry, JJ., are omitted.

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itself out to the service of the public, for hire, as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and, as we think, contrary to the great weight of the well-reasoned adjudications both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court. Telegraph Co. v. Hyer, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222. In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the cause célèbre of Hadley v. Baxendale, 9 Exch. 341, * * * hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone—a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower, as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that, if its importance had been disclosed to the operator, that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission; that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which, in consideration thereof, he had agreed to perform, and which the law, in consideration of his promise, and the reception of the consideration therefor, had already enjoined on him." The answer to all this is that the same argument is equally applicable as a reason why the rule in Hadley v. Baxendale should not apply to carriers of goods for hire. The carrier of goods, in contracting to carry and deliver, deals with the tangible. When he contracts, he has in his mind's eye, from the visible, tangible subject of his contract, what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier.

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Therefore, the damage likely to flow from a breach by the carrier can properly be said to enter mutually into the contemplation of both parties to the contract, and it is this mutuality in the contemplation of both parties to the contract of the results that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus mutually contemplated are in fact the damages that the law will impose for the breach. Why? Because, in the eye of the law, the parties having mutually contemplated such damages in going into such contract, those damages can alone be inferred as having entered into their contract as a silent element thereof. The rule in Hadley v. Baxendale is applicable alone to breaches of contract, and formulates concisely the measure of damages for the breach of those contracts that do not within themselves, in express terms, fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that part of the contract which, in the eye of the law, has been mutually agreed upon between the parties, but concerning which their contract itself is silent. This essential leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in Telegraph Co. v. Hyer, supra, i. e. that the damages provided for under the rule arise ex contractu, and that, unless there is mutuality in all the essential elements that enter into or grow out of the contract, the whole fabric becomes unilateral, and abhorrent in the eyes of the law. The assertion, as a rule of law, that one party to a contract shall alone have knowledge that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other party to the contract all of such, to him, unforeseen, unexpected, uncontemplated, nonconsented-to damages, seems to us to be a complete upheaval of all the old landmarks in reference to damages upon broken contracts, and the establishment of a new rule, that is neither fair, just, or equitable, and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied, under like conditions, to every violated contract where individuals are the contracting parties. The argument in Telegraph Co. v. Hyer, supra, that it was not shown that the telegraph company would have charged more, or used more dispatch, or taken more care, or been aided in any way in the performance of its duty, if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the rule of law as to the damage that parties to contracts are entitled to, as matter of legal right, upon breach thereof, a consideration of anything that might or might not in fact have prevented the wrongful breach has nothing to do with the subject whatever. But we are to look to and consider the mutual rights of the parties from the inception of the contractual relations between them, down through the contract itself, to the breach complained of. One of the primary rights

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that each party has, who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct, probable results will reasonably, and in the usual course of events, follow bad faith, neglect, or other breach upon his part. Why? Not that it will or will not in fact deter him from being delinquent, but that he may, if he will, so act as to guard against and avoid, for his own benefit, the foreseen, calamitous consequence, or that he may, if he does not, be held to have knowingly and willingly subjected himself to the contemplated consequences of his wrong, that, from being foreseen and contemplated, the law will impute his consent thereto.

That the rule formulated in Hadley v. Baxendale, supra, is the one properly applicable to the contracts of telegraph companies for the transmission of messages has the support of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities. * * *

In the case at bar, the message that it is alleged the defendant company failed to send was in cipher, and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist, Rosa Bonheur, named in the message, or whether it related to a matter of dollars and cents. There was no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness," in the message, had a special meaning. What that special meaning was, he did not disclose. Under these circumstances, all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message. * * *

MABRY, J. (dissenting) * * * Over six years ago this question was deliberately settled here by the decision in the case of Telegraph Co. v. Hyer, 22 Fla. 652, 1 South. 129, 1 Am. St. Rep. 222. It is proposed now to reverse this case, and my view is that it should not be done. * * * Under the decision in the Hyer Case, there was a remedy for damages for a failure on the part of a telegraph company to send a cipher message, when it had, for compensation, agreed to do so. There is much merit in the rule that, where the company holds itself out to the public as a transmitter of cipher messages for pay, it should not be allowed, after receiving the money and agreeing to send the message, to deny its liability for damages resulting from its own violation of duty on the ground that the message was in cipher, and its contents not known to the company when it agreed to send it.

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This court having planted itself in favor of this rule over six years ago, I do not think we should now disturb it. I do not see how greater harm will result from adhering to the decision than overruling it.[47]

III. Avoidable Consequences.

MILLER v. TRUSTEES OF MARINER'S CHURCH.

(Supreme Judicial Court of Maine, 1830. 7 Me. 51, 20 Am. Dec. 341.)

The action was begun upon an assumpsit to furnish a quantity of hammered stone to be delivered at Portland by June 15, 1828. The stones were not wholly furnished until November following, and the defendants claim in offset damages occasioned by the breach of the contract. Such damages were allowed to the defendants.

Weston, J.[48] * * * If the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. Thus in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved.

The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and, if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser.

If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. "Qui non prohibet, cum prohibere possit, jubet." And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a

[47] The following are leading cases upon the application of the rule of Hadley v. Baxendale, ante, p. 189 to the transmission of telegrams: Sanders v. Stuart, 1 C. P. Div. 326 (1876); Beaupre v. P. & A. Tel. Co., 21 Minn. 155 (1874); Squire v. W. U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157 (1867); Landsberger v. M. T. Co., 32 Barb. (N. Y.) 530 (1860); Baldwin v. U. S. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165 (1871); Daugherty v. A. U. T. Co., 75 Ala. 168, 51 Am. Rep. 435 (1883), cipher; W. U. T. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877 (1884), cipher; Pepper v. W. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699 (1895); Postal Tel. Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55 (1890); Rittenhouse v. I. T. L., 44 N. Y. 263, 4 Am. Rep. 673 (1870); U. S. T. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519 (1868).

[48] Part of the opinion is omitted, and the statement of facts is rewritten.

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legal point of view, accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might, by common prudence, have prevented. For example; a party contracts for a quantity of bricks to build a house, to be delivered at a given time; and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases, and, for any unavoidable loss occasioned by the failure of the other, he is justly entitled to a liberal and complete indemnity. * * * [49]

LOKER v. DAMON et al.

(Supreme Judicial Court of Massachusetts, 1835. 17 Pick. 284.)

Trespass quare clausum. The declaration set forth, that the defendants destroyed and carried away ten rods of the plaintiff's fences, in consequence of which certain cattle escaped through the breach and destroyed the plaintiff's grass, and that he thereby lost the profits of his close from September, 1832, to July, 1833.[50]

SHAW, C. J.[51] * * * The court are of the opinion that the direction respecting damages was right. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and wilfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, thus damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the costs of repairing it,

[49] Cf. Smith v. McGuire, 3 Hurl. & N. 554 (1858).

[50] The statement is abridged from that in the official report.

[51] Part of the opinion is omitted.

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and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say, that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say, that in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages, for that part of the injury which consisted in removing the fence and leaving the close exposed. * * *[52]

LAWRENCE et al. v. PORTER et al.

(Circuit Court of Appeals of United States, 1894. 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167.)

Before TAFT and LURTON, JJ.

LURTON, J.[53] * * * This is an action for breach of a contract of sale brought by the buyers against the sellers for failure to deliver a large quantity of lumber according to the terms of the agreement. The lumber was to be delivered by the defendants at their mill, on vessels to be furnished by the plaintiffs, during the shipping season of 1890. As each cargo was received, the buyer was to give acceptances, payable in 90 days. After the delivery of one cargo, the defendants refused, for no sufficient reason, to deliver the remainder upon the terms of the bargain, but offered to supply the lumber needed to complete the bill at a reduction of 50 cents on each 1,000 feet, for cash on delivery over the rail of plaintiffs' vessels and at the time when delivery was required by the broken agreement. The buyers stood upon their contract, and demanded delivery upon the credit therein stipulated, and refused to take the lumber offered by the delinquent sellers on any other terms than those contained in the agreement. There was evidence tending to show that the quantity and quality of lumber contracted for, and of the dimensions designated, could not be procured at the place of delivery from others than the defendants, or at any other available market in time for shipment according to the terms of the contract; that the lumber was intended for resale at Tonawanda, N. Y.; that defendants were so informed; and that the market value of such lumber at Tonawanda, after deducting freight and hauling, was considerably above the contract price. * * *

The ground upon which the defendants refused to carry out the sale was ostensibly their unwillingness to extend to the plaintiffs the credit of 90 days provided for in the agreement of sale. They have not endeavored to show that there were any circumstances which justified this breach of the agreement. Credit is often a material element in a contract of sale, whereby the buyer is enabled to operate upon the capital of the seller. Credit extended without interest is, in effect, a

[52] Accord: Smith v. C., C. & D. R. R. Co., 38 Iowa, 518 (1874).

[53] Part of the opinion is omitted.

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sale at the stipulated price less the interest for the period of credit. The damage for a breach of contract to pay money at a particular date is the lawful rate of interest for the period of default, unless some other penalty is imposed by the agreement. So it would seem that if the buyer, in order to supply himself with the articles which the seller was obligated to sell, is compelled to buy from another, and to pay cash, one element of recovery for the breach would be interest upon his purchase for the period of credit. It is the well-settled duty of the buyer, when the seller refuses to deliver the goods contracted for, to do nothing to aggravate his injury. Indeed, he must do all that he reasonably can to mitigate the loss. If the buyer could have supplied himself with goods of like kind, at the place of delivery or other available market, at the time the contract was broken, and neglected to do so, whereby he suffered special damages by reason of the breach, he will not be suffered to recompense himself for such special damage, for the reason that to that extent he has needlessly aggravated the loss. The contention of the plaintiffs is that they could not supply themselves at the time the contract was broken with lumber of the qualities and sizes mentioned in their contract either at the place of delivery or at any other available market; that they were not required to buy from the defendants, who were already in default; that to have bought from them would operate both to encourage breaches of contracts, and would have been a waiver of all other right of recovery for the breach of their agreement; that to have accepted the proposal of the defendants to supply them for cash at the reduced price would simply have been to substitute one contract for another, thereby enabling defendants to escape all liability for a deliberate and indefensible violation of the bargain. They therefore insist that the measure of damage was the difference between the contract price and the market value at Tonawanda, N. Y., less freights to that point; the evidence showing that the lumber was bought for resale at Tonawanda, and that defendants were informed of that purpose.

For a breach of contract of sale, the law imposes no damages by way of punishment. The innocent party is simply entitled to recover his real loss. If the market value is less than the contract price, the buyer has sustained no loss. This is axiomatic, and needs no citation of authority. If the plaintiffs could have bought at East Jordan, or at any other convenient and available market, at the time of the breach, lumber of like kinds, at the same price or a less price, it would be clear that they would have sustained no general damages. If they refused to avail themselves of such opportunity, and thereby sustained special and unusual loss, by reason of not having lumber of the kinds called for by the contract, or by being deprived of a profit resulting from a resale at Tonawanda, they could not recover such special damage, for such damage might have been avoided by replacing the undelivered lumber by other of like kinds. The fact that they could only buy from the defendants does not affect the duty of plaintiffs to minimize their loss as far as they reasonably could. The offer to sell for cash at a

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reduced price more than equalized the interest for 90 days, which was the value of credit. There seems to be no insurmountable objection in thus permitting a delinquent contractor to minimize his loss. The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage. Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117; Deere v. Lewis, 51 Ill. 254. * * *

The opinion in Warren v. Stoddart rests upon the theory that the buyer does not surrender or yield any right of action he may have for the breach of contract. It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller; if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not the abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage, save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, or to sell for a less price than the market price, though in excess of the contract price, with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages.

The case of Deere v. Lewis, cited above, was a case much like the one under consideration. The goods could be procured only from the defendant, who offered the goods for cash at 5 per cent. less than the contract price. It was held that plaintiff could recover only nominal damages, inasmuch as he could have bought the goods for less than the contract price from the delinquent seller.

The cases of Havemeyer v. Cunningham, 35 Barb. (N. Y.) 515, and Manufacturing Co. v. Randall, 62 Iowa, 244, 17 N. W. 507, have been cited as sustaining a different result. The first case rested upon a state of facts very unlike those here involved. The other seems to have gone off upon the apprehension that, if the buyer supplied himself by a purchase from the delinquent seller, he thereby abandoned his contract, and substituted a new agreement in place of the broken bargain. That apprehension seems unjustified. But, however that may be, the case of Warren v. Stoddart is controlling. The offer after the breach by the defendants to sell the lumber necessary to complete the contract was not coupled with any condition operating as an abandonment of the contract, nor as a waiver of any right of action for damages for the breach. * * *

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ILLINOIS CENT. R. CO. v. COBB, CHRISTY & CO.

(Supreme Court of Illinois, 1872. 64 Ill. 128.)

Cobb, Christy & Co. during the winter of 1864–65 were engaged in furnishing corn at Cairo for the use of the army under a contract with the government. They had made large purchases of corn along the line of the Illinois Central Railroad Company through one Fallis, who drew on them for the cost of the corn as soon as he shipped it, at the same time forwarding the bill of lading. This action is brought to recover damages by reason of the failure of the railroad company to deliver such corn in a reasonable time at Cairo, whereby the plaintiffs lost the opportunity of delivering the same under their contract.

LAWRENCE, C. J.[64] * * * It is also urged that the plaintiffs should have gone into the market at Cairo and have bought corn to fill their contract, and that, not having done so, they can only recover the market price. However this might be, if they had not already invested their money in the corn in controversy, we can not so hold in the present case. It would be very unreasonable to require one, who has bought and paid for an article, to have the money in his pocket with which to buy a second, in case of nondelivery of the first. This demand comes with an ill grace from a party by whose fault there has been a failure of delivery. * * *

KADISH et al. v. YOUNG et al.

(Supreme Court of Illinois, 1883. 108 Ill. 170, 43 Am. Rep. 548.)

SCHOLFIELD, J. This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants denied the making of the alleged contract, that they were partners, or that any purchase of the barley was made

[64] Part of the opinion is omitted, and the statement of facts is rewritten.

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for their joint account; and they also contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention. * * *

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit of such forward contract, but that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants' failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see McNaught v. Dodson, 49 Ill. 446; Larrabee v. Badger, 45 Ill. 440, and Saladin v. Mitchell, Id. 79), and is not contested by appellant's counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account of the buyer, or making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell, (where the property is in the possession of the seller at the time,) at least within a reasonable time after such breach, will result as a necessary consequence of the breach. When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is

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now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer can not thus create a breach of contract upon which the seller is bound to act. In Leigh v. Paterson, 8 Taunt. 540, Phillpotts v. Evans, 5 Mees. & W. 475, Ripley v. McClure, 4 Exch. 359, and, it may be, also in other early cases, it was held a party to a contract to be performed in the future can not, by merely giving notice to the opposite party that he will not perform his part of the contract, create a breach of the contract. Subsequently, however, in Cort v. Railway Co., 6 Eng. Law & Eq. 230, and more explicitly in Hochster v. De Latour, 20 Eng. Law & Eq. 157, the doctrine was announced as not in conflict with previous decisions, that the party to whom notice is given in such cases will be justified in acting upon the notice, provided it is not withdrawn before he acts. Lord Campbell, C. J., in delivering his opinion in the latter case, and speaking for the court, used this language: "The man who wrongfully renounces a contract into which he has deliberately entered, can not justly complain if he is immediately sued for a compensation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and can not be prejudicial to the wrongdoer." * * *

Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January. * * *[56]

[56] See, contra, Roth v. Taysen, 12 Times Law R. 211 (1896).
See, also, cases herein under heading "Fluctuations in Value."

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SUTHERLAND v. WYER et al.

(Supreme Judicial Court of Maine, 1877. 67 Me. 64.)

VIRGIN, J.[57] The plaintiff contracted with the defendants to "play first old man and character business, at the Portland museum, and to do all things requisite and necessary to any and all performances which" the defendants "shall designate, and to conform strictly to all the rules and regulations of said theatre," for thirty-six weeks, commencing on Sept. 6, 1875, at thirty-five dollars per week; and the defendants agreed "to pay him thirty-five dollars for every week of public theatrical representations during said season." By one of the rules mentioned, the defendants "reserved the right to discharge any person who may have imposed on them by engaging for a position which, in their judgment, he is incompetent to fill properly."

The plaintiff entered upon his service under the contract, at the time mentioned therein and continued to perform the theatrical characterizations assigned to him, without any suggestion of incompetency, and to receive the stipulated weekly salary, until the end of the eighteenth week, when he was discharged by the defendants, as they contended before the jury, for incompetency under the rule; but, as the plaintiff there contended, for the reason that he declined to accept twenty-four dollars per week during the remainder of his term of service.

Three days after his discharge and before the expiration of the nineteenth week, the plaintiff commenced this action to recover damages for the defendants' breach of the contract. The action was not premature. The contract was entire and indivisible. The performance of it had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it; and the action was not brought until after the discharge and consequent breach. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285, and cases. * * *

There are several classes of cases founded both in tort and in contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule, are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. Remelee v. Hall, 31 Vt. 582, 76 Am. Dec. 140. Among these are actions on bonds or unsealed contracts stipulating for the

[57] Part of the opinion is omitted.

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support of persons during their natural life. Sibley v. Rider, 54 Me. 463; Philbrook v. Burgess, 52 Me. 271.

The contract in controversy falls within the same rule. Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. Prima facie, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury. * * * The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And this balance with interest thereon should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60, from all sources after his discharge,—$25 in February, and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10th, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6th, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be verdict set aside and a new trial granted.

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SULLIVAN et al. v. McMILLAN et al.

(Supreme Court of Florida, 1896. 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239.)

McMillan and Wiggins agreed to cut and deliver to Sullivan, since deceased, all the logs of certain specified dimensions and free from certain specified defects growing upon certain described lands of the decedent. Many logs were duly delivered pursuant to the contract; but, following the death of Sullivan, his representative refused to receive any further logs, whereupon this action was brought for damages sustained by McMillan and Wiggins under the contract.

LIDDON, J.[58] * * * It is urged by appellants that the plaintiffs, when they received notice that the defendants would not further comply with or perform the contract, should have done all that reasonably lay within their power to protect themselves from loss by seeking another contract of like character, and that, the plaintiffs having sought and obtained such a contract immediately after the breach sued upon, the defendants were entitled to have a proportionate amount of the profits applied in mitigation of the damages for which they were liable. Otherwise it is contended that the plaintiffs would make two profits for the same time, and with the same teams, and that speculation would be substituted for compensation, which is the basis of the law of damages for breaches of contract. These propositions are undoubtedly correct when applied to some classes of cases. They have special reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services. Thus, in a contract for teaching in a school, which was broken by a refusal to receive the services, it was held to be the plaintiff's duty to make reasonable exertion to obtain other like employment in the same vicinity, and thus mitigate the damages. Gillis v. Space, 63 Barb. (N. Y.) 177; Benziger v. Miller, 50 Ala. 206. The same rule was laid down for a similar breach of a contract with an actress. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285. Where the plaintiff, owner of a portable saw mill, agreed to remove it to the farm of the defendant, and to saw a stated number of logs, to be furnished by the defendant, during certain seasons of the year 1865, and the defendant, after furnishing a portion, broke his contract by refusing to furnish more of such logs, but during the time he (plaintiff) would have been engaged in sawing defendant's logs he was offered other employment of the same kind, so that his mill need not have been idle, it was held that the damages caused by the breach sued upon should have been mitigated. Heavilon v. Kramer, 31 Ind. 241. * * *

The contract which was broken in the present case was not one for personal services, nor one which the parties contemplated should be

[58] Part of the opinion is omitted, and the statement of facts is rewritten.

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performed with any special means or instrumentality. It was simply a contract for the delivery of certain logs at a certain place, and might have been performed by the plaintiffs with their own teams and personal labor, or by any other means or agency to which they might have seen fit to intrust the performance of the same. There is nothing in the contract to show that the execution of the same required all or any great portion of the time or personal attention of both or either of the plaintiffs; or that it was impracticable for plaintiffs to be engaged in other business and the performance of other contracts contemporaneously with the performance of the contract in controversy. We do not think the rule invoked as to mitigation of damages by subsequent earnings and profits applies to this case. A distinction is recognized between a case of the character of that now before us, and those to which we have alluded. * * *

There was no legal obligation upon the plaintiffs in this case to enter upon the performance of other contracts for the benefit of the defendants. The Supreme Court of Wisconsin, in Cameron v. White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493, where a contention like that of appellants in this case was made, as we think properly said: "As the plaintiffs could not enhance the damages against the defendant by their neglect to make the best of what they had on their hands, so they are not bound to lessen the damages by making other contracts, and performing them, and giving the benefit of the performance of such contracts to the defendant." A very full exposition of this subject, showing the difference in the rules applicable to contracts for personal service and those for the doing of a specific act, can be found in Watson v. Brick Co., 3 Wash. 283, 28 Pac. 527. This discussion is too lengthy to insert entire in this opinion. The gist of the whole matter, the conclusion of the court, citing Wolf v. Studebaker, 65 Pa. 459, is thus stated: "The duty to seek employment is dependent upon the original contract being one of employment or hire. It is not applicable to every contract. * * * Ordinary contracts of hire and contracts for the performance of some specified undertaking cannot be governed by the same rule. That in one case the party can earn no more than the wages, and if he gets that his loss will be but nominal; whereas, in the other case, the loss of the party is the loss of the benefit of the contract. The damages may be said to be fixed by the law of the contract the moment it is broken, and cannot be altered by collateral circumstances independent of and totally disconnected from it, and from the party occasioning it. To plead the doctrine of avoidable consequences to such case, * * * 'would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime.' * * * If the rule was to be observed that the damages proven must be direct and proximate, the same rule must be invoked in the reduction of damages." In Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co., 100 Mo. 325, 13 S. W.

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503, where an attempt was made to offer evidence similar to that excluded in the present case, it was said: "Where a servant is wrongfully discharged during his term, and lays his damages at the contract wages for the balance of the term, it is generally held that evidence may be introduced in mitigation of damages of what he might have earned in the interim by using reasonable efforts to procure other employment. So, in general, where a party has been injured or damaged by a breach of a contract, he should do whatever he can to lessen the injury. Many cases asserting these principles of law are cited by the defendant, but they have no application to the case in hand. The plaintiff owned its factory and the machinery, and the contract constituted no such relation as that of master and servant. It had the right to make as few or as many other contracts as it saw fit while executing the contract with defendant, and it is entitled to the profits which it might have made on this particular contract. The evidence offered in mitigation of damages was properly excluded." * * *

The second matter, as already stated, is whether any interest is recoverable. * * * "There are two tests which are constantly applied by the courts, having been found by them more useful than the attempted division into liquidated and unliquidated demands. Of these the first is whether the demand is of such a nature that its exact pecuniary amount was either ascertained or ascertainable by simple computation, or by reference to generally recognized standards, such as market price; second, whether the time from which interest, if allowed, must run—that is, a time of definite default or tort feasance, —can be ascertained." * * *

Without setting forth even a brief summary of the evidence in the case, we think it sufficient to say that it was so exact and definite as to the amount of damage sustained by the plaintiffs, and the elements of the same, that it only required a simple computation by the jury to fix the amount. We think the case falls within the rule stated, that the damages could be readily liquidated and ascertained by the jury by simple computation, and that the plaintiffs were entitled to interest thereon. * * *[59]

[59] Danforth, J., in Fuchs v. Koerner, 107 N. Y. 529, 14 N. E. 445 (1887): "On the ninth of February, 1884, the defendant, T. E. Koerner, engaged the plaintiff, Herman Fuchs, 'for his business in essential oils and essences for one year,' from the sixth of February, 1884, for the yearly wages of $1,800, in weekly payments of $37.50. The plaintiff served under that agreement until July 6, 1884, when the defendant closed up his business, and for that reason discharged the plaintiff. He nevertheless reported daily to the defendant, and also sought employment elsewhere. The defendant offered to employ him in making and selling fancy boxes. This he declined, but in fact earned $15 in other ways. He sued to recover damages for the breach of the agreement, and the jury awarded him $712. * * * The learned trial judge charged the jury that it was the plaintiff's duty to use reasonable diligence in procuring another place of the same kind in order to relieve the defendant, as much as possible, from the loss consequent upon his breach of contract, but that he was not bound to accept occupation of another kind. An exception to this qualification presents the only question

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WHITMARSH v. LITTLEFIELD et al.

(Supreme Court of New York, 1887. 46 Hun, 418.)

The action was brought to recover damages for the breach of a contract, by which the defendants hired the plaintiff to assist in loading ice boats at an agreed price of two dollars per day while the old ice lasted, and one dollar and seventy-five cents per day for the balance of the season, until the close of navigation, on or about December 5, 1886. The complaint alleged the defendants discharged the plaintiff on or about August 30, 1886.

LEARNED, P. J.[60] * * * The alleged contract found by the jury was that plaintiff was to work as long as the old ice lasted for two dollars per day. There was evidence that when, as the jury found, the defendants broke this contract, that the defendants offered to pay one dollar and seventy-five cents per day, for the work on the old ice; as is fully stated thereafter. And the principal question here relates to the ruling on this point. The court directed the jury to deduct what plaintiff had received for his services; but declined to direct them to deduct what plaintiff had an opportunity to earn in work of a similar character. Now, the opportunity referred to was the offer of defendants to pay one dollar and seventy-five cents for the same work for which they had contracted to pay two dollars. The defendant's counsel cites Bigelow v. American F. P. Company, 39 Hun, 599. In that case after defendants had distinctly discharged plaintiff from their service, they directed him to go to Panama, and he refused. The court held that the offer by defendants in the same line of business, and plaintiff's refusal should have been admitted to diminish the damages, because it tended to show what he might have earned.

There is a distinction between that case and the present. It does not appear that in that case the defendants, when they proposed to discharge him, offered to employ him at a less salary to do the work for which they had originally contracted. But, in this case, to take the defendant's own statement, Littlefield said to the plaintiff and others "that I could not pay them two dollars any longer; that I would like to have them go in the boat and work the same as they had before, for fourteen shillings." And as another of defendant's witnesses says in another place, he told them he wanted them to consider the matter and go to work for fourteen shillings. Now, this was a plain proposition to give up the old arrangement or contract and accept a new one. That is, to continue in the same employment at a less price. If the plaintiff and the others had acceded to this, they would have virtually

raised upon this appeal, and it must be answered in favor of the plaintiff. He was ready during the entire year to perform his agreement, and could not be required to enter upon a new business, or one different from that which he had undertaken."

[60] Part of the opinion is omitted.

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surrendered the old contract and have made a new. No one could understand the transaction otherwise than as a change or modification of the old arrangement. And if the plaintiff and the others had thereupon gone on and worked for the defendants, they never could have recovered more than the one dollar and seventy-five cents per day.

Of course when a contract has been broken by one party and the parties make thereafter a new contract, the new contract does not necessarily take away the action for damages for the breach. McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370. But on the other hand, the parties to a contract may modify it by mutual consent. And the proposition made by defendant Littlefield, if acted upon by plaintiff and others, would plainly have been such a modification. Under the facts of this case, therefore, we do not think it necessary to pass on the question whether if a fair and distinct offer of employment had been made by defendants which plaintiff had refused, this should have been considered in diminution of damages. It might be questionable whether plaintiff was bound to enter into another contract with those who had broken the former. But it is enough to say that the proposition of Littlefield over which only the question arises, was under the circumstances, a proposition to abandon the old and to form a new contract. The recovery for the whole time seem to be justified by Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319. * * *[61]

YORTON v. MILWAUKEE, L. S. & W. R. CO.

(Supreme Court of Wisconsin, 1884. 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.)

The plaintiff delivered his ticket from Marion to Oshkosh to one Sherman, conductor of defendant's train, asking for a stop-over check at Clintonville. The conductor by mistake gave him a trip check instead, and when plaintiff got upon the second train later at Clintonville, after a stop over, Bartlett, the conductor thereof, refused to honor the trip check for further passage under the rules of the company. Plaintiff left the train under the orders of Bartlett, after refusing to pay the fare to his destination, which amounted to $1.85. The plaintiff by reason of exposure became sick.

[61] But see Bigelow v. A. F. P. M. Co., 39 Hun, 598 (1886), and Heilbroner v. Hancock, 33 Tex. 714 (1871).

On the duty of a discharged employé to secure re-employment, see, further, Williams v. C. Coal Co., 60 Ill. 149 (1871); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285, post, p. 313 (1875); Ream v. Watkins, 27 Mo. 516, 72 Am. Dec. 283 (1858); Huntington v. Ogdensburgh, 33 How. Prac. (N. Y.) 416 (1867); Harrington v. Gies, 45 Mich. 374, 8 N. W. 87 (1881); Lee v. Hampton, 79 Miss. 321, 30 South. 721 (1901). But that the duty does not arise upon the breach of all contracts of employment, see, in accord with Sullivan v. McMillen, 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239 (1896), Wolf v. Studebaker, 65 Pa. 459 (1870), Crescent Mfg. Co. v. Nelson Mfg. Co., 100 Mo. 325, 13 S. W. 503 (1889), and Watson v. Gray's H. B. Co., 3 Wash. 283, 28 Pac. 527 (1891).

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COLE, C. J.[62] * * * It is not entirely clear from the complaint whether the action is for a breach of contract, or for a violation of duty as common carrier, though we assume that it is of the latter character. But it can make no essential difference as to the rule of damages upon the facts proven. Whatever damages the plaintiff can show he sustained, which were the direct and natural consequence of the injurious act of Conductor Sherman, these the plaintiff may recover.

The learned counsel for the defendant says that the only natural and legitimate result of that act was to compel the plaintiff to again pay his fare from Clintonville to Oshkosh. This might have been the only loss the plaintiff sustained from the mistake of Conductor Sherman had he seen fit to pay his fare. But he did not do this, and exercised the option which the law gave him, of leaving the train and looking to the company for redress. The same counsel further says the plaintiff might have protected himself from all loss or inconvenience arising from the fault or mistake of the first conductor at a trifling expense, and that he failed in a social duty by omitting to do so. The jury found that he had sufficient money with him when on the second train to have paid his fare from Clintonville to Oshkosh. But was he under any legal obligation to pay the additional fare exacted? He had once paid for a ticket to Oshkosh, and claimed the right to ride to his destination. Probably most persons having the ability would, under like circumstances, pay the additional fare rather than submit to the inconvenience and delay of leaving the train at that hour and place. But, as we have said before, we think the plaintiff had the option either to pay or leave the train and resort to his legal remedy. There are men who, in social life and business matters, act upon the maxim, "Millions for defense, but not a cent for tribute;" in other words, men who stand upon their strict legal rights. There is certainly a class of cases where the law imposes upon a party injured by another's breach of contract or tort the duty of making reasonable exertions to render the injury as light as possible.

Counsel have referred to authorities which affirm that rule of law. They have also cited cases which hold that a passenger cannot insist upon remaining on the train without paying fare, in order that force shall be used for his expulsion and then claim damages for the force thus used. But we have not been referred to a case analogous to this, which decides that it was the duty of the plaintiff to have paid the fare exacted and remain on the train, in order to protect the company against the consequences of the mistake or fault of the first conductor. According to our view, the law imposed upon him no such duty. On the contrary, when he was ordered to leave the train or pay the additional fare, he had an election to leave, or remain on the condition of paying. Having concluded to leave, he has his remedy against the company for his damages, which are not necessarily limited to the

[62] Part of the opinion is omitted, and the statement of facts is rewritten.

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additional fare paid subsequently to go to Oshkosh, and interest thereon. The law allows him to recover full compensation for the damages he sustained by reason of the fault of the first conductor. * * *[63]

LOESER et al v. HUMPHREY.

(Supreme Court of Ohio, 1884. 41 Ohio St. 378, 52 Am. Rep. 86.)

DICKMAN, J.[64] The original action was brought in the court of common pleas of Cuyahoga county by Edward Humphrey against Loeser & Co. for alleged carelessness in leaving their horse insecurely tied, whereby he broke away and ran, with the wagon to which he was harnessed, into the wagon of Humphrey, and severely injured him in his person. At the trial the plaintiff gave testimony tending to prove that by reason of the collision and accident the plaintiff had suffered a concussion of the spinal cord and brain, resulting in an injury to his eyesight, which was thereby much impaired; and that in consequence of his injuries his ability to walk was also much impaired, with other consequential damage. The defendants, to maintain the issue on their part, gave testimony tending to prove that the ordinarily approved medical treatment in such cases was to administer currents of electricity to the patient and the injured parts, and that, if such had been done in the present case, the condition of the plaintiff would have been better than it was; that for want of such treatment his condition was rendered worse, and more likely to be permanent than it would have been had electricity been applied. * * *

The court charged in reference to the medical treatment of the plaintiff for his injuries as follows: * * * "After the plaintiff was injured he was bound to use ordinary care and prudence, under

[63] Granger, J., in Ellsworth v. C., B. & Q. R. R., 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173 (1895).

"The more difficult question is as to his remedy for the wrong done him; that is, when the conductor refused to accept the ticket because of its date, had the plaintiff the legal right to insist on a passage on that train, and resist removal therefrom, or should he have paid his fare, as demanded, and sought redress from the company on that basis, or, not wishing to do that, should he, on request of the conductor, to avoid damage, have left the train without resistance, and based his damage on the mistake in selling him the ticket? * * * A thought in argument is, and some language of the opinions referred to seems to favor it, that it is the duty of the passenger to not enhance damages by resistance, because it is of no use, but that he should submit quietly to ejectment, and then seek his damages. To say the least, we think he may make any resistance, not amounting to a criminal disturbance of the peace, as was done in this case, and that he is not called upon to submit to a wrongful ejection for the purpose of economizing the damages to be recovered."

[64] Part of the opinion is omitted.

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all the circumstances, to take care of himself and his wounds; and if he employed a physician of good standing and reputation, supposing and having reason to think he was such, and who in fact was such—as it is admitted he was in this case—then, though the physician may not have used all the approved remedies, or that remedy which would have been most suitable in the case, or which a good medical man would have used under the circumstances, and on account of the failure to use such usual or proper remedy his condition is worse than it would be had it been used, still plaintiff may recover for his actual damages, if he himself has not been negligent; and such treatment or failure to use such remedy, merely, will not prevent him from recovering the full extent of his injuries as aforesaid." * * *

There can be no dispute but that Humphrey acted in good faith, showed due diligence, and used reasonable means to effect his cure and restoration. He employed a physician "of good standing and reputation." It was not incumbent upon him to incur the greatest expense, and call in the most eminent physician or surgeon of the highest professional skill and most infallible judgment, before he could hold the defendants answerable for the condition in which he was left at the end of his medical treatment. Having exercised ordinary care and reasonable judgment in selecting a physician, he was not required, as said by the court, in Stover v. Bluehill, 51 Me. 439, "to insure, not only the surgeon's professional skill, but also his immunity from accident, mistake, or error in judgment," in order to recover of the original wrongdoer damages arising from no fault on his part, and from causes beyond his power to control.

It seems to be well settled that, where one is injured by the negligence of another, if his damage has not been increased by his own subsequent want of ordinary care, he will be entitled to recover of the wrongdoer to the full extent of the damage, although the physician whom he employed omitted to apply the remedy most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise would have been. Lyons v. Railway Co., 57 N. Y. 489; Tuttle v. Farmington, 58 N. H. 13. * * *

The collision must be treated as the proximate cause of Humphrey's damage. It was that that imposed upon him the necessity of employing a physician, and of being subject to all the contingencies attendant upon the present imperfect state of medical science. * * *

The defendants requested the court below to charge the jury that, "if the attending physician did not give the plaintiff the ordinarily approved treatment, and his case is worse on that account than it would otherwise have been, then to that degree the defendants would not be liable for his said worse condition." The court refused so to instruct the jury, and in so refusing we think there was no error. If the condition of Humphrey was worse because his physician did not give the

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ordinarily approved treatment, it cannot be attributed to any want of care and prudence on Humphrey's part in securing medical or surgical aid. * * *[65]

ELLIS v. HILTON.

(Supreme Court of Michigan, 1889. 78 Mich. 150, 43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438.)

LONG, J.[66] This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured. It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial his counsel stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal. A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him $35 for cure and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought there was a chance that he might."

Dr. De Cow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

[65] See Bailey v. City of Centerville, 108 Iowa, 20, 78 N. W. 831 (1899), where the court held that, if a slight surgical operation will give relief, there is a duty resting on the plaintiff in a personal injury action to undergo such operation.

Plaintiff need not become himself a wrongdoer in avoiding consequences. C., R. I. & P. R. R. Co. v. Carey, 90 Ill. 514 (1878). The plaintiff need only act as a reasonable person would be expected to act. Salladay v. Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541 (1893). One's duty to avoid consequences arises only upon the commission of the wrong. Driver v. W. U. R. R. Co., 32 Wis. 569, 14 Am. Rep. 726 (1873); Plummer v. P. L. A., 67 Me. 363 (1877).

[66] Part of the opinion is omitted.

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It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this $35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in Watson v. Bridge, 14 Me. 201, 31 Am. Dec. 49, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss." In Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under

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any circumstances, in expending more than the animal was worth in attempting a cure. * * *[67]

Judgment reversed, and new trial ordered.

WARD'S CENTRAL & PACIFIC LAKE CO. v. ELKINS.

(Supreme Court of Michigan, 1876. 34 Mich. 439, 22 Am. Rep. 544.)

CAMPBELL, J.* Elkins recovered damages against the plaintiff in error for failure to carry certain salt from Bay City to Chicago in November, 1874. Elkins was a salt dealer in Chicago, and sued upon an alleged contract whereby the plaintiff in error was to carry three cargoes of salt, of about seventeen thousand bushels in all, only one of which was taken. The cargoes were to be called for from the 15th to the 20th of November. The regular business of plaintiff in error was between Buffalo and Duluth, with power, as was claimed, to do business elsewhere on the lakes.

Elkins gave evidence tending to show that he could not get vessels to carry the salt after plaintiff's default. He had it taken by rail to Chicago in lots as he wanted it, from January to some time in April, 1875, and was allowed to recover the difference between the price agreed on with plaintiff and what he paid for the transportation by rail. This is the chief error complained of.

We do not see upon what rule this recovery can be justified. The damage to which Elkins was entitled, if any, would be such as would have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such. The only advantage he could have gained by a timely shipment according to contract would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more.

He would not have been justified in procuring shipment by rail, if the railroad process would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary

[67] See, also, cases under heading "Expenses Incurred," post.

*Part of the opinion is omitted.

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articles of consumption, always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account. Le Blanche v. Railway Co., 1 C. P. Div. 286.

When such a necessity exists, it is maintained only as a necessity, and allowed because of its urgency. If such a rule is ever applicable, it cannot be satisfied by allowing a party, instead of seeking other means of carriage immediately at hand, to await his leisure and speculate on future chances and make shipments piecemeal, as was done here.

It is altogether likely that after the close of navigation, and as the winter goes on, prices may rise so as to warrant shipments by rail, when this would not have been profitable earlier; and it may be possible, after paying railroad rates, to make as much profit as if the salt had been received by steam on the lakes and put in market in the fall at fall rates. It would be absurd to say that these deliberate winter shipments were necessitated or justified by a failure to get shipping facilities during the season, or near the close of navigation in November. It would be equally unjust to allow the owner of the salt to speculate on the chances of a market without risk to himself.

The rule of damages should have been as previously indicated, and should in no case exceed the damages actually incurred. A party who has lost nothing by a breach of contract, is not entitled to damages of a substantial character. * * *

SECTION 2.—CERTAINTY OF PROOF.

MASTERTON v. MAYOR, ETC., OF CITY OF BROOKLYN.

(Supreme Court of New York, 1845. 7 Hill, 61, 42 Am. Dec. 38.)

The plaintiffs contracted to furnish from Kain & Morgan's quarry, to be paid for pro rata as the work progressed, all the marble necessary to erect a city hall in the city of Brooklyn. In order to obtain this marble, a contract was afterwards entered into by the plaintiffs with Kain & Morgan. The plaintiffs furnished marble under the contract to the amount of 14,779 feet out of a total, as estimated, of 88,819 feet, when the defendant suspended the work. About 3,308 further feet, properly prepared for delivery, was then on hand.

NELSON, C. J.[68] The damages for the marble on hand, ready to be

[68] The opinions of Beardsley and Bronson, JJ., and part of the opinion of Nelson, C. J., are omitted, and the statement of facts is rewritten.

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delivered, were not a matter in dispute on the argument. The true measure of allowance in respect to that item was conceded to be the difference between the contract price and the market value of the article at the place of delivery. This loss the plaintiffs had actually sustained, regard being had to their rights as acquired under contract.

The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so.

The plaintiffs insist that the gains they would have realized, over and above all expenses, in case they had been allowed to perform the contract, enter into and properly constitute a part of the loss and damage occasioned by the breach; and they were accordingly permitted in the course of the trial to give evidence tending to show what amount of gains they would have realized if the contract had been carried into execution.

On the other hand, the defendants say that this claim exceeds the measure of damages allowed by the common law for the breach of an executory contract. They insist that it is simply a claim for the profits anticipated from a supposed good bargain, and that these are too uncertain, speculative, and remote to form the basis of a recovery.

It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. * * *

When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the

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account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and often does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed than if it had been made with one in prosperous or affluent circumstances. Dom. bk. 3, tit. 5, § 2, art. 4.

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed; perhaps the only inducement to the arrangement. The parties may, indeed, have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself. * * *

It has been argued that inasmuch as the furnishing of the marble would have run through a period of five years—of which about one year and a half only had expired at the time of the suspension—the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But, in my judgment, no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of

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the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.

It will be seen that we have laid altogether out of view the subcontract of Kain & Morgan, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these subcontracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. The idea of assuming that the plaintiffs were necessarily compelled to break all their subcontracts as a consequence of the breach of the principal one, and that the damages to which they may be thus subjected ought to enter into the estimate of the amount recoverable against the defendants, is too hypothetical and remote to lead to any safe or equitable result. And yet the fact that these subcontracts must ordinarily be entered into preparatory to the fulfillment of the principal one, shows the injustice of restricting the damages, in cases like the present, to compensation for the work actually done, and the item of materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in fault.

If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount it be made upon a substantial basis, and not be left to rest upon the loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with

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care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital. * * *

GRIFFIN v. COLVER et al.

(Court of Appeals of New York, 1858. 16 N. Y. 489, 69 Am. Dec. 718.)

Action to recover the purchase price of an engine. Defendants sought to recoup damages for delay in delivery of the engine.

SELDEN, J.[69] The only point made by the appellants is that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.

Hence, in an action for the breach of a contract to transport goods, the difference between the price, at the point where the goods are and that to which they were to be transported, is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that

[69] Part of the opinion is omitted.

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the goods would have been worth the established market price at the place and on the day when and where they should have been delivered.

On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe. * * *

Similar language is used in the cases of The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456, and La Amistad de Rues, 5 Wheat. 385, 5 L. Ed. 115. Indeed, it is clear that whenever profits are rejected as an item of damages it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of Blanchard v. Ely, 21 Wend. 342, 34 Am. Dec. 250, must have proceeded upon this ground, and can, as I apprehend, be supported upon no other. It is true that Judge Cowen, in giving his opinion, quotes from Pothier the following rule of the civil law, viz.: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his own (other) affairs." But this rule had no application to the case then before the court. It applies only to cases where, by reason of special circumstances having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from such breach; as where a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business not necessarily connected with the agreement. An instance of the latter kind is where a canon of the church, by reason of the nondelivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes.

In such cases the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract. Hence the objection is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to fulfill his collateral agreement, or perform the act supposed. Sedg. Dam. c. 3.

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In Blanchard v. Ely the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. It is clear, therefore, that the rule of Pothier had nothing to do with the case. Those damages must then have been disallowed, because they consisted of profits depending, not, as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of trade, and many other contingencies. The citation, by Cowen, J., of the maritime cases to which I have referred, tends to confirm this view. This case, therefore, is a direct authority in support of the doctrine that whenever the profits claimed depend upon contingencies of the character referred to, they are not recoverable.

The case of Masterton v. Mayor, etc., of Brooklyn, 7 Hill, 61, 42 Am. Dec. 38, decides nothing in opposition to this doctrine. It simply goes to support the other branch of the rule, viz., that profits are allowed where they do not depend upon the chances of trade, but upon the market value of goods, the price of labor, the cost of transportation, and other questions of the like nature, which can be rendered reasonably certain by evidence.

From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits.

But it by no means follows that no allowance could be made to the defendants for the loss of the use of their machinery. It is an error to suppose that "the law does not aim at complete compensation for the injury sustained," but "seeks rather to divide than satisfy the loss." Sedg. Dam. c. 3. The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

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These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach, and yet, if in their nature uncertain, they must be rejected; as in the case of Blanchard v. Ely, where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the horse.

Cases not unfrequently occur in which both these conditions are fulfilled; where it is certain that some loss has been sustained or damage incurred, and that such loss or damage is the direct, immediate and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain. * * *

Had the defendants in the case of Blanchard v. Ely, supra, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiffs' contract.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., are not only susceptible of more exact and definite proof, but, in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is, upon the whole, a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place.

The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to

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pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted. * * *[70]

ALLISON v. CHANDLER.

(Supreme Court of Michigan, 1863. 11 Mich. 542.)

The plaintiff alleged a wrongful ouster by defendant, his landlord, from a storeroom in Detroit which plaintiff had occupied as a jeweler for over six years, whereby his business was broken up and injuries of divers kinds sustained.

CHRISTIANCY, J.[71] * * * While in many cases the rule of damages is plain and easy of application, there are many others in which, from the nature of the subject-matter, and the peculiar circumstances, it is very difficult—and in some cases impossible—to lay down any definite, fixed rule of law by which the damages actually sustained can be estimated with a reasonable degree of accuracy, or even a probable approximation to justice; and the injury must be left wholly, or in great part, unredressed, or the question must be left to the good sense of the jury upon all the facts and circumstances of the case, aided by such advice and instructions from the court as the peculiar facts and circumstances of the case may seem to require. But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted. * * *

The principle of compensation for the loss or injury sustained is, we think, that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort. * * *

There are some important considerations which tend to limit damages in an action upon contract, which have no application to those

[70] In several earlier maritime cases it was thought that no allowance for profits should be made. The Schooner Lively, 1 Gall. 315, Fed. Cas. No. 8,403 (1812); The Anna Maria, 2 Wheat. 327, 4 L. Ed. 252 (1817); The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456 (1818). These cases, since Masterton v. Mayor of Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38 (1844), and Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 (1858), have not represented the rule of the common law.

"The loss of the use of a vessel and of the earnings which would be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision." Lord Herschell, in The Argentino, 14 App. Cas. 519 (1889), holding such profits recoverable. Likewise, where a definite contract for future voyages had been made. Richardson v. Mellish, 2 Bing. 229 (1824). But see Priestly v. Maclean, 2 Fost. & F. 288 (1860), where profits were deemed too uncertain.

[71] Part of the opinion is omitted, and the statement of facts is rewritten.

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purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages when, in their nature, the amount must be uncertain. Hence, when suit is brought upon such contract, and it is found that the entire damages actually sustained can not be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the contract would have given him in case of performance. His position is one in which he has voluntarily contributed to place himself, and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone.

Again, in the majority of cases upon contract, there is little difficulty from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulation, or the subject-matter, the actual damages resulting from a breach, are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured, in case of a breach; and if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted.

Again, in analogy to the rule that contracts should be construed as understood and assented to by the parties—if not as a part of that rule —damages which are the natural, and, under the circumstances, the direct and necessary result of the breach, are often very properly rejected, because they cannot fairly be considered as having been within the contemplation of the respective parties at the time of entering into the contract.

None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he received any consideration, or chance of benefit or advantage, for the assumption of such hazard; nor has the wrongdoer given any consideration, nor assumed any risk, in consequence of any

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act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrongdoer might take or injure his property or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules, when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Is he to blame because the case happens to be one of this character? He has had no choice, no selection. The nature of the case is such that the wrongdoer has chosen to make it, and upon every principle of justice he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume, not simply to divide this risk, which would be thus far unjust, but to relieve the wrongdoer from it entirely, and throw the whole upon the innocent and injured party? Must not such a course of decision tend to encourage trespasses, and operate as an inducement for parties to right themselves by violence, in cases like the present?

Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation,—to say nothing of justice,—does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort as well as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market and has a market value. But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover

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no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure a portion, and only a portion, of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount cannot be measured by a fixed rule; here to apply any such rule to the whole case, is to misapply it; and so far as it excludes all damages which cannot be measured by it perpetrates positive injustice under the pretense of administering justice.

The law does not require impossibilities, and cannot, therefore, require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury. * * *

The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum—or the difference between the rent he was paying and the fair rental value of the premises—if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens,

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etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others for the balance of the term would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year, and he is ousted from the premises, and this business entirely broken up for the balance of the term, can he be allowed to recover nothing but six cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for the business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so obviously contrary to the common experience of the facts as to make the injustice of the rule gross and palpable. But we need not further discuss this point, as a denial of any such presumption was clearly involved in our former decision.

The plaintiff in this case did hire another store, "the best he could obtain, but not nearly so good for his business"; "his customers did not come to the new store, and there was not so much of a thoroughfare by it—not one-quarter of the travel; and he relied much upon chance custom, especially in the watch-repairing and other mechanical business." This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. This point, also, was decided in the former case, and we there further held that the declaration was sufficient to admit the proof of this species of loss.

Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business before the injury, as well as after, not only might, but should be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished (if anything) would certainly be less than if it were a profitable one. It is not the amount of business done, but the gain or profit arising from it, which constitutes its value.

But it is insisted that loss of profits constitutes no proper ground or element of damages. If there be any such rule of law it is certainly not a universal, and can hardly be called a general, rule. Decisions,

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it is true, may be found which seem to take it for granted that the rule is universal. But there are numerous cases, even for breach of contract, in which profits have been properly held to constitute not only an element, but a measure (and sometimes the only measure), of damages, as in Masterton v. Mayor, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; Railroad Co. v. Howard, 13 How. 344, 14 L. Ed. 157. And in actions for breach of contract in not delivering goods (as wheat or other articles) having a marketable value, as well as in most actions of trespass or trover for the taking or conversion of such property,—wherever the difference between the contract price, or the market value at the time of taking or conversion, and the higher market value at any subsequent period, is held to constitute the damages,—in all such cases this difference of price is but another name for profits, and is yet very properly held to be a measure of damages. There is nothing, therefore, in the nature of profits, as such, which prevents their allowance as damages. But in many, and perhaps the majority, of cases upon contract in which the question has arisen, they have been held to be too remote or dependent upon too many contingencies to be calculated with reasonable certainty, or to have been within the contemplation of the parties at the time of entering into the contract.

But there are also cases for breach of contract where, though the profits were in their nature somewhat uncertain and contingent (and in most of them quite as much so as in the present case), they were yet held to constitute, not strictly a measure, but an element of damages proper for the consideration of a jury to enable them to form a judgment or probable estimate of the damages. * * * But whatever may be the rule in actions upon contract, we think a more liberal rule in regard to damages for profits lost should prevail in actions purely of tort (excepting perhaps the action of trover). Not that they should be allowed in all cases without distinction, for there are some cases where they might, in their nature, be too entirely remote, speculative, or contingent to form any reliable basis for a probable opinion. And perhaps the decisions which have excluded the anticipated profits of a voyage broken up by illegal capture or collision may be properly justified upon this ground. Upon this, however, we express no opinion. But generally, in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages; as when they are but another name for the use of a mill (for example), as in White v. Moseley, 8 Pick. (Mass.) 356; or for the use of any other property where the value or profit of the use can be made to appear with reasonable certainty by the light of past experience, as might often be done where such profits had been for a considerable time uniform at the same season of the year, and there are no circumstances tending to show a probable diminution, had the injury not occurred. And possibly the same view, subject to the like qualifications, might have been taken

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of the profits of the plaintiff's business had it been confined to the mechanical trade of repairing watches and making gold pens, particularly if done purely as a cash business. But this business seems to have been carried on with that of the sale of jewelry. He kept a jewelry store, and the profits of so much of his business as may be regarded as mercantile business are dependent upon many more contingencies, and therefore more uncertain, especially if sales are made upon credit. Past profits, therefore, could not safely be taken as the exact measure of future profits; but all the various contingencies by which such profits would probably be affected should be taken into consideration by the jury, and allowed such weight as they, in the exercise of good sense and sound discretion, should think them entitled to. Past profits in such cases, where the business has been continued for some length of time, would constitute a very material aid to the jury in arriving at a fair probable estimate of the future profits, had the business still continued without interruption.

Accordingly such past profits have been allowed for this purpose, both in actions ex contractu and ex delicto, though more frequently in the latter, where from the nature of the case no element of greater certainty appeared, and the actual damages must be more or less a matter of opinion; and where, as in the present case, though somewhat inconclusive, it was the best evidence the nature of the case admitted. * * *

But it is urged by the counsel for the defendant that damages for the loss of profits ought not to be allowed, because they could not have been within the contemplation of the defendant. Whether, as matter of fact, this is likely to have been true, we do not deem it important to inquire. It is wholly immaterial whether the defendant, in committing the trespass, actually contemplated this or any other species of damage to the plaintiff. This is a consideration which is confined entirely to cases of contracts, where the question is, what was the extent of obligation, in this respect, which both parties understood to be created by the contract? But where a party commits a trespass he must be held to contemplate all the damages which may legitimately follow from his illegal act. * * *

BAGLEY v. SMITH et al.

(Court of Appeals of New York, 1853. 10 N. Y. 489, 61 Am. Dec. 756.)

This was an action by Bagley, the plaintiff, against G. & E. M. Smith, to recover damages for a premature dissolution of a partnership between the plaintiff and the defendants, before the expiration of the term mentioned in their articles. * * * A witness for the plaintiff, who had been employed to keep the accounts of the late firm, was asked, what were the profits of the firm for the last six months of its existence. The defendants' counsel objected to this inquiry,

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on the grounds, that for the breach of copartnership articles, no damages, or, at most, only nominal damages, could be recovered; that by the constitution of the partnership, the partners have a power of revocation, whenever they lose confidence in each other; that prospective profits form no ground of damages at all; and that if damages were recoverable at all, on the ground of loss of profits, they must be limited to the period between the 10th August, 1848, when the notice of dissolution was given, and the day when the plaintiff went into business again on his own account. The learned judge, however, overruled the objection, and admitted the testimony, not as a rule of damages, but as evidence for the jury; to which an exception was taken. * * *[72]

JOHNSON, J.[73] * * * The next question relates to the admission of the evidence of the amount of past profits, to be considered by the jury as bearing upon future profits. It will be observed that the objection does not at all relate to the mode of proof, but only to the competency of the fact. It seems to me quite obvious that, outside of a court of justice, no man would undertake to form an opinion as to the prospective profits of a business, without, in the first place, informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of a tribunal called upon to determine conjecturally the amount of prospective profits, than proof of the nature of the business, or any other circumstance connected with its transaction. It is very true that there is a great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of the past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry, by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary. * * *

BRIGHAM et al. v. CARLISLE.

(Supreme Court of Alabama, 1884. 78 Ala. 243, 56 Am. Rep. 28.)

CLOPTON, J.[73] * * * But there are damages, which are in the contemplation of the parties at the time of making the contract, and are the natural and proximate results of its breach which are not recoverable. The parties must necessarily contemplate the loss of profits as the direct and necessary consequence of the breach of a con-

[72] The statement of the case is abridged from that of the official report.
[73] Part of the opinion is omitted.

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tract, and yet all profits are not within the scope of recoverable damages. There are numerous cases, however, in which profits constitute, not only an element, but the measure, of damage. While the line of demarcation is often dim and shadowy, the distinctive features consist in the nature and character of the profits. When they form an elemental constituent of the contract, their loss the natural result of its breach, and the amount can be estimated with reasonable certainty—such certainty as satisfies the mind of a prudent and impartial person—they are allowed. The requisite to their allowance is some standard, as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained. Illustrations of profits recoverable are found in cases of sales of personal property at a fixed price, evictions of tenants by landlords, articles of partnership, and many commercial contracts.

On the other hand, "mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot, under any circumstances, be brought within the range of recoverable damages" 1 Suth. Dam. 141. Profits speculative, conjectural or remote are not, generally, regarded as an element in estimating the damages. In Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519, it is said: "What are termed 'speculative damages'—that is, possible, or even probable, gains, that it is claimed would have been realized but for the tortious act or breach of contract charged against a defendant—are too remote, and cannot be recovered." The same rule has been repeatedly asserted by this court. Culver v. Hill, 68 Ala. 66, 44 Am. Rep. 134; Higgins v. Mansfield, 62 Ala. 267; Burton v. Holley, 29 Ala. 318, 65 Am. Dec. 401; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; French v. Ramge, 2 Neb. 254; 2 Smith, Lead. Cas. 574; Olmstead v. Burke, 25 Ill. 86. The two following cases may serve to illustrate the difference between profits recoverable and not recoverable In Insurance Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91, an insurance agent, who had been discharged without cause before the expiration of his contract, was allowed to include in his recovery the probable value of renewals on policies previously obtained by him, upon which future premiums would, in the usual course of business, be received by the company, on the ground that the amount of compensation due on such renewals can be ascertained with requisite certainty by the use of actuary's life tables and comparisons, and that the basis of the right to damages existed, and was not to be built in the future. In Lewis v. Insurance Co., 61 Mo. 534, which is cited with approval in the other case, the same rule as to the probable value of renewals was held; but it was also held that an estimate of the probable earnings of the agent thereafter, derived from proof of the amount of his collections and commis-

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sions before the breach of the contract, in the absence of other proof, is too speculative to be admissible. * * *

The plaintiff, by the contract, undertook the business of traveling salesman for the defendants. The amount of his commissions depended, not merely on the number and amounts of sales he might make, but also on the proportional quantity of the two classes of goods sold, his commissions being different on each. The number and amounts of sales depended on many contingencies,—the state of trade, the demand for such goods, their suitableness to the different markets, the fluctuations of business, the skill, energy, and industry with which he prosecuted the business, the time employed in effecting different sales, and upon the acceptance of his sales by the defendants. There are no criteria, no established data, by reference to which the profits are capable of any estimate. They are purely speculative and conjectural. Besides, the evidence is the mere opinion and conjecture of the plaintiff, without giving any facts on which it was based. The bare statement, uncorroborated by any facts, and without a basis, that "the reasonable sales would have been fifteen thousand dollars, and that the net profits on that amount of sales would have been four hundred and fifty dollars," is too conjectural to be admissible. Washburn v. Hubbard, 6 Lans. (N. Y.) 11. * * *

HICHHORN, MACK & CO. et al. v. BRADLEY.

(Supreme Court of Iowa, 1902. 117 Iowa, 130, 90 N. W. 592.)

Action for cigars sold and delivered. Defendant set up, by way of counterclaim, damages sustained through the breach by plaintiff of an agreement which the defendant alleged gave him the exclusive right to sell "Tom Moore" cigars in certain territory in Iowa. The defendant by efforts and expenditures had created a demand for the cigars in this territory, when plaintiffs refused to furnish any more cigars. From a judgment for defendant on his counterclaim, the plaintiffs appealed.

McCLAIN, J.[75] * * * Here we are not concerned with the question which sometimes arises, whether profits are within the contemplation of the parties, according to the rule of Hadley v. Baxendale, 9 Exch. 341, which has been frequently cited, and has been approved by this court in Manufacturing Co. v. Day, 50 Iowa, 250, and other cases. It is perfectly clear in this case that the profits to be derived from the sale of these cigars constituted the only consideration to the defendant for entering into the contract, and that the loss of such profits was in the contemplation of the parties at the time the contract was made as a direct consequence which would result from its breach. And it is well settled that when the loss of future profits is thus in the con-

[75] Part of the opinion is omitted, and the statement of facts is rewritten.

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templation of the parties, and does directly result from the breach of the contract, the amount of profits thus lost may be recovered. * * *

The distinction between an erroneous rule of law, sometimes assumed, that prospective profits are not to be considered in measuring damages for breach of contract, and the correct proposition, that remote and speculative profits cannot be shown, for the reason that no sufficient evidence thereof is attainable, is thus stated in U. S. v. Behan, 110 U. S. 338, 344, 4 Sup. Ct. 81, 83, 28 L. Ed. 168: "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance, less the value of materials on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of Masterton v. Mayor, etc., 7 Hill (N. Y.) 69, 42 Am. Dec. 38, they are the 'direct and immediate fruits of the contract,' they are free from this objection. They are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements—something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense." * * *

So where an agent contracts to give his entire time to his employer for a compensation to be determined by commissions on sales of goods, his measure of damage for being thrown out of employment under the contract is the value of his time lost, and not the profits which he would have made; the value of his time being a more satisfactory measure than the uncertain and indefinite profits. Machine Co. v. Bryson, 44 Iowa, 159, 24 Am. Rep. 735; Sewing Mach. Co. v. Sloan, 50 Iowa, 367; Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28. These last three cases are especially relied on by appellant, but the present case is plainly distinguishable from them. In those cases there was a measure of damage which could be resorted to for the purpose of giving the injured party relief for breach of contract; and the court in each case thought that this measure was more satisfactory than that to be reached by considering the profits which might have been made by the complaining party, had he been allowed to perform his contract. If the question considered in Machine Co. v. Bryson, supra, were now before us for the first time, we might, in view of the

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later authorities, incline to the view expressed in the dissenting opinion. As supporting that view, see, in addition to cases already cited, Wells v. Association, 39 C. C. A. 476, 99 Fed. 222, 53 L. R. A. 33. But in the case before us there is no such measure of damage available as was found in the cases relied on by counsel for appellant. Defendant did not contract to give his entire services to plaintiff in the sale of cigars, nor were his entire earnings dependent on the profits to be made out of this contract. Here it is impossible to estimate his damage by the value of the time lost. Nor is it possible to measure his damage by the labor and expense involved in introducing plaintiffs' cigars to the trade. To some extent, defendant has already been compensated for that labor and expense by the profits derived from the sale of plaintiffs' cigars during the time of the continuance of defendant's agency; and it would be manifestly impossible to determine the proportion of the labor and expense for which he had received compensation, and the proportion for which he was dependent by way of compensation on the profits which should have been derived from future sales which he was not allowed to make. It is well established by the decided preponderance of authority that where future profits are in the contemplation of the parties, and there is no other basis on which damages for breach of contract can be estimated, such profits may be made the basis for the recovery of damages. * * *

In a somewhat similar case (Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676) it is said that damages by way of prospective profits "are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions

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as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract." To the same effect, see Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785. Although such a measure of damages may be unsatisfactory and uncertain, yet, if it is the most satisfactory and certain measure which is attainable, justice is not to be defeated because a better measure is not at hand. "The administration of justice frequently proceeds with reasonable certainty of accomplishing what is right, or as nearly right as human efforts may attain in the face of similar difficulties; and it does so by making the experience of mankind, or, rather, the judgment which is founded upon such experience, the guide." Taylor v. Bradley, 39 N. Y. 129, 144, 100 Am. Dec. 415. It seems never to have been held in this state that, where there is no other measure of damages for breach of contract, a contracting party is to be denied any damage because no better measure than the reasonable prospective profits of a business is attainable. We think that it would be manifestly unjust to deny to the defendant in this case any recovery whatever for breach of his contract because the contract itself contemplated and was based upon prospective profits. * * *[76]

HALL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of United States, 1888. 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479.)

The plaintiff at Des Moines, Iowa, delivered to the defendant, for transmission to Oil City, Pa., at 8 a. m. November 9, 1882, a message directing his broker to buy 10,000 barrels of petroleum, if, in his judgment, it was best to do so. The message was not delivered until 6 p. m. November 9th, through the negligence of the defendant. The market price of oil at the time the message should have been received was $1.17 per barrel. When it was received the exchange had closed, and on the following morning the price had risen to $1.35, at which figure the broker did not deem it advisable to buy. A judgment was rendered for plaintiff for $1,800 damages.

MATTHEWS, J.[77] * * * It is found as a fact that if the dispatch upon its first receipt at Oil City had been promptly delivered to Charles T. Hall, to whom it was addressed, he would, by 12 o'clock on that

[76] See, also, Horne v. Midland Ry. Co., ante, p. 195; Bernstein v. Meech, post, p. 423; Booth v. Spuyten Duyvil Rolling Mill Co., ante, p. 203; Trigg v. Clay, post, p. 344; Redmond v. Am. Mfg. Co., post, p. 518; Poposkey v. Munkwitz, post, p. 593, note; Hodges v. Fries, post, p. 593, note; U. S. Trust Co. of N. Y. v. O'Brien, post, p. 593, note; Guetzkow Bros. v. Andrews, ante, p. 207; U. S. v. Behan, post, p. 422; Allen v. Fox, post, p. 516; Brownell v. Chapman, 84 Iowa, 504, 51 N. W. 249, 35 Am. St. Rep. 326 (1892).

[77] Part of the opinion is omitted, and the statement of facts is rewritten.

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day, have purchased 10,000 barrels of oil at the market price of $1.17 per barrel, on the plaintiff's account. He was unable to do so in consequence of the delay in the delivery of the message. * * * If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not, or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory, then, on which the plaintiff could show actual damage or loss is on the supposition that, if he had bought on the 9th of November, he might and would have sold on the 10th. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place. * * *

Of course, where the negligence of the telegraph company consists not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value is clearly within the rule for estimating damages. Of this class examples are to be found in the cases of Turner v. Telegraph Co., 41 Iowa, 458, 20 Am. Rep. 605, and Rittenhouse v. Telegraph, 44 N. Y. 263, 4 Am. Rep. 673; but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor

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that he could have resold at a profit at any subsequent day. The only damage, therefore, for which he is entitled to recover is the cost of transmitting the delayed message. * * *

ADAMS EXPRESS CO. v. EGBERT.

(Supreme Court of Pennsylvania, 1860. 36 Pa. 360, 78 Am. Dec. 382.)

STRONG, J.[78] The express company are common carriers. In 1858, they received from the plaintiff below, a box containing plans and specifications, to be forwarded to a committee who had offered a premium of $500 to the successful competitor, for the best plans for the Touro Almshouse at New Orleans. The plaintiff's drawings were sent for competition. In consequence of the default of the company, they were not delivered until after the appointed day for receiving them, nor until after the premium had been awarded. The committee was, however, then convened, and the plans were examined. On the trial, it was proved by one member, the only one whose testimony was taken, that in his opinion, the plans, had they been received in time, would not have been adopted, because they did not suit the climate, and because they were altogether objectionable. This is an action against the company to recover damages for the breach of their contract to deliver in time, and the question is, what is the proper rule for the measurement of damages.

It is doubtless true, that in all actions for the breach of a contract, the loss or injury for which damages are sought to be recovered, must be a proximate consequence of the breach. A remote or possible loss is not sufficient ground for compensation. There is no measure for those losses which have no direct and necessary connection with the stipulations of the contract, or which are dependent upon contingencies, other than the performance of the contract, and which are therefore incapable of being estimated. With no certainty can it be said, that such losses are attributable to the wrongful act or omission of him who has violated his engagement. But on the other hand, the loss of profits or advantages, which must have resulted from a fulfillment of the contract, may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made.

Applying this rule to the present case, why was not the loss of the opportunity to compete for the premium (whatever may have been its value), an immediate consequence of the breach of the contract? Why was not that loss in contemplation of the parties? The company undertook to transport the box to the committee appointed to award the premium. The purpose of the contract was to secure to the plain-

[78] Part of the opinion is omitted.

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tiff the privilege of competition. Certainly he must have had that in contemplation, and if the company were informed of the object of the transmission, the loss of this privilege was in view of both parties at the time they entered into the contract. But whether known or not by the company, the loss was an immediate result of their negligent breach. We do not now stop to inquire, whether the defendants can be held liable for every consequence, even though immediate, which cannot reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Perhaps, if the special circumstances, under which the contract was made, and which occasioned special and unusual injury to attend its breach, were unknown to the party which broke it, they could not be held to make compensation for more than the amount of injury which generally results from the breach of such contracts in cases unattended by any special circumstances. We are inquiring now, however, only whether the loss of the opportunity by the plaintiff to exhibit his plans and specifications for competition, was, or was not, too remote a consequence of the breach of contract to be taken into consideration by the jury. We cannot perceive why it was not the first consequence, proximate, immediate. Some doubt may be suggested, arising out of the case of Watson v. Ambergate, Nottingham & Boston Railway Company, 15 Jurist, 448, a case in the Queen's Bench, England, the facts of which closely resemble those of the present case. There a prize had been offered for the best plan and models of a machine for loading colliers from barges, and plans and models for the competition were to be sent by a certain day. The plaintiff sent a plan and model accordingly by a railway, but through negligence, it did not arrive at its destination until after the appointed day. The court appeared to be of opinion, though the point was not directly raised, that the proper measure of damages was the value of labour and materials expended in making the plan and model, and not the chance of obtaining the prize, the latter being too remote a ground for damages. Patteson, J., said, that the right principle upon which damages were recoverable, was that the goods were made for a special purpose, which had been defeated by the negligence of the defendants, and thus they had become useless.

It is difficult to see how the loss of the time and labour expended, is a less remote consequence of the breach of the contract, than is the loss of the opportunity to compete. Nor is it apparent, how the value of the labour and materials expended upon the plan and model in that case, or the value of the time and labour devoted to the plans and specifications in this, can be regarded as any measure of the damages sustained in consequence of the non-delivery in time of the articles sent, unless the opportunity to compete for the prize be also taken into the estimation. If the chance for the prize is too remote, if it has no appreciable value, and cannot be considered by the jury, then what

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has been lost by the breach of the contract to deliver in time? Not the plans and specifications, for they are still in existence. The plaintiff has them. The time and labour would have been lost, without any breach of the contract, if the plaintiff's competition for the prize had proved unsuccessful. Their loss was not, therefore, necessarily a consequence of the breach of the contract. And if the time and labour were expended, solely to secure a chance which was valueless, how can they have any value? They are certainly as remote and as contingent as is the chance itself. The fact appears to be, that the opportunity to compete, is what gives the time and labour expended any value, and if there can be any recovery at all, beyond nominal damages, as was held by the Queen's Bench, it must be because the loss of the chance for the prize, as it was then called, or as I would term it, the loss of the opportunity to compete for the prize, is not too remote to be considered, and because its worth is capable of being measured.

But how is this loss to be estimated? Suppose the engagement of the company had been directly to afford to the plaintiff an opportunity to compete for the premium offered. Could he, for the breach of such an engagement, have recovered more than nominal damages, without any proof that any actual injury had resulted from the breach? We think not. To entitle a plaintiff in an action founded on a contract, to recover more than nominal damages for its breach, there must always be evidence that an actual, substantial loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of the damages; and even when there is some such proof, but the amount is uncertain, courts have sometimes directed the jury to allow the smallest sum which would satisfy the proof. Lawton v. Sweeny, 8 Jurist, 964; Clunness v. Pezzey, 1 Campb. 8. A plaintiff claims compensation. The amount of that compensation is a part of his case. Whether in the present case this plaintiff sustained any actual injury, depended upon the degree of probability there was, that he would have been a successful competitor if the contract had not been broken. If his plans were entirely defective, if they were suited better for a bridge than for an almshouse, it cannot be claimed that he was damaged. He introduced, however, no evidence to show that there was the least probability that the premium would have been awarded to him, had his plans been submitted to the committee in time. On the contrary, the defendants proved that doubtless he must have failed. So far, then, from there being proof of actual damage, it was disproved. The court below, however, instructed the jury that there might be a recovery for more than nominal damages. They reversed the rule generally recognized, that the plaintiff must show a substantial, real injury, and cast upon the defendants the burden of proving that there was none. In this we think there was error. The second point of the defendants should have been affirmed unqualifiedly. Independent of the defendants' evidence, the plaintiff was not entitled to

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recover more than nominal damages, because he had not proved any actual damages, and the chance for the premium was contingent. Much more was this so upon the whole evidence in the cause. * * *

SHERMAN CENTER TOWN CO. v. LEONARD.

(Supreme Court of Kansas, 1891. 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101.)

The defendant company, desiring to increase the influence and population of Sherman Center so as to make it the county seat, agreed with plaintiff to remove plaintiff's hotel from Itasca to Sherman Center and to convey certain lots to him in return for his removal to that place. The plaintiff complained that the defendant failed to remove the hotel, that Sherman Center had become a flourishing place, where the keeping of a hotel would have been profitable, and that he was without business, as Itasca had become depopulated.

JOHNSTON, J.[79] * * * The prospective profits that he lost by the breach of the contract are too remote, uncertain, and speculative to be recoverable. Who can tell what the future gains of the hotel business would have been in Sherman Center, if he had moved there? His past profits in Itasca were not shown, and there is no testimony of the gains of others established in the same business at Sherman Center. How, then, does Leonard know that the profits would have been $150 per month? The gains to be derived from the business depended upon many contingencies other than the mere removal of his hotel to that place. The growth of the town; the location of the county-seat there or at another town near by; the immigration and travel; the competition in the hotel business; the price of provisions and the cost of help; the general reputation of the house; and the popularity of the landlord with the traveling public and the people of that community,—are suggested as some of the considerations that would affect the anticipated benefits. Where the breach of a contract results in the loss of definite profits, which are ascertainable, and were within the contemplation of the contracting parties, they may generally be recovered; but the prospective profits do not furnish the correct measure of damages in the present case. Aside from the remote, conjectural, and speculative character of the anticipated benefits, it cannot be said that the loss of them is the direct and unavoidable consequence of the breach. The plaintiff could not sit idle an indefinite length of time and safely count on the recovery of $150 per month as damages. If there was a breach of the contract, it was his duty, upon learning of it, to at once remove the building, or employ others to do so, and charge the cost of the removal to the town company. The law requires that the injured party shall do whatever he reasonably can and

[79] Part of the opinion is omitted, and the statement of facts is rewritten.

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improve all reasonable opportunities to lessen the injury. From the testimony it appears that Leonard could have procured others to move the hotel; and in such a case the ordinary measure of damages is the cost of removal, and the reasonable expenses of avoiding the consequence of the defendant's wrong. Railway Co. v. Mihlman, 17 Kan. 224. * * *[80]

McPEEK v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Iowa, 1899. 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205.)

LADD, J.[81] September 20, 1896, after mortally wounding John Finley, the marshal of Morning Sun, Orman McPherson fled. A few days later the plaintiff saw his wife, who promised to assist him in procuring the arrest of her husband. McPeek obtained McPherson's pension papers from Keithsburg, Ill., for her; and she advised him (being in secret correspondence under an assumed name) of having these, and he came to her room at the hotel at Morning Sun, where she was employed as cook, October 22, 1896, at about 10 o'clock p. m. (having so arranged earlier in the evening), and there remained until between 3 and 4 o'clock the following morning. Before coming in, he gave up his revolvers, and she placed them in a bureau, where they remained during his stay. She had agreed to write to McPeek when she expected her husband, but, if he came unexpectedly, then to telegraph him. At about 7 o'clock p. m. of the 22d, she delivered to the defendant's agent at Morning Sun this telegram: "E. E. McPeek, Winfield: Come on first train. Answer. M. E. M.—" telling him she wanted it "sent right away and delivered and wanted an answer." [Ridgeway, the agent at Winfield, failed to deliver the message until the following morning after the only train for Morning Sun for the day had left. McPeek had told Ridgeway that he was making an effort to capture McPherson and might get a telegram from Morning Sun about the matter.] On the 21st day of October, 1896, the governor of Iowa, by proclamation, offered a reward of $300 for the arrest of McPherson, and his delivery to the proper authorities. The plaintiff's action is based on the allegation that he lost this reward through the negligence of the defendant in not delivering the message on the evening of October 22d. * * *

It is insisted that the damages were remote, and not such as either party might have contemplated from the wording of the message. But extrinsic evidence was admissible to show that defendant had notice of the importance of the message. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; Telegraph Co. v. Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835. The

[80] Accord: Watson v. Ambergate Ry., 15 Jur. 448 (1851).

[81] Part of the opinion is omitted.

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appellant argues the case on the theory that the action of plaintiff is for the breach of contract. He made no contract with the defendant. This is conceded by appellant in its opening argument, and denied in its reply. The first impression was undoubtedly the correct one. The contract was with the sender of the message, and whether recovery might be had for breach thereof, because made for plaintiff's benefit, we need not determine. This action is based on the negligence of the defendant in the performance of a duty in its public capacity as a common carrier of messages. In all such actions, sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force." Mentzer v. Telegraph Co., 93 Iowa, 757, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294. * * *

"There was evidence tending to show that immediate delivery was requested and that the agent at Winfield knew that McPeek was expecting a message, that it would relate to the capture of McPherson, and that prompt delivery was required. If so, while he may not have known of the reward being offered, he may well be credited with understanding that McPeek was putting forth his efforts to accomplish a purpose from which he anticipated some benefit to accrue to himself. The law authorizes the offering of such rewards, and it is not too strict a rule to hold the defendant responsible for such losses as may reasonably be anticipated to follow its negligence, whether informed definitely what these may be or not. It was charged with knowledge that such a reward might be made, and it might reasonably reckon on such a contingency, in omitting its duty with reference to such a message. Nor was the plaintiff advised that the reward had actually been offered on October 22d, though he understood it would be, and was acting to secure this and others proposed by local officers. That the omission of the defendant caused greater loss than he then supposed, does not affect its liability, or his right of recovery. Certainly the loss of the reward was the direct result of the failure to arrest and deliver McPherson to the proper authorities, for this was the very condition of its payment.

The burden was on the plaintiff to prove that in all reasonable probability the loss resulted from the negligence of the defendant. Hendershott v. Telegraph Co., 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313. Had the plaintiff proceeded by team to Morning Sun, with the assistance of the two constables and another, there seems no good reason to doubt that he would have arrested McPherson, who had been disarmed by his wife. This is not absolutely certain, for many contingencies may be supposed which could have intervened. While these might well be considered, they do not warrant us in saying that these men would not have accomplished that which has often been

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done before, and which is ordinarily done by officers in like situation. Whether they would in all probability have succeeded, was for the jury to determine. * * *

WHITE et al. v. MILLER et al.

(Court of Appeals of New York, 1877. 71 N. Y. 118, 27 Am. Rep. 13.)

The defendants were growers of garden seeds for sale, and the plaintiffs were market gardeners. The defendant warranted seeds purchased by plaintiffs to be large Bristol cabbage seed, but they were instead of a mixed variety, of no value, except as food for cattle. 105,000 plants were set out, of which 100,000 lived; but only 200 produced Bristol cabbages.

ANDREWS, J.[82] * * * The referee, in fixing the damages, followed the rule laid down in Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753, which was also an action for a breach of warranty, in the sale of cabbage seed. The defendant in that case warranted the seed to be Bristol cabbage seed, and that it would produce Bristol cabbage. The court held, all the judges concurring, that the plaintiff was entitled to recover the difference in value between the crop raised from the defective seed, and a crop of Bristol cabbage, such as would ordinarily have been produced in the year in which the seed was to be sown. The learned judge, who delivered the opinion, referred to a large number of authorities as sustaining the rule adopted by the court; and, among others, to the case of Randall v. Roper, E., B. & E. 84, in which it was held that in an action on a warranty, made by the defendants to the plaintiff, on a sale by the former to the latter of seed barley, that the seed sold was "chevalier" seed barley, but which was, in fact, barley of an inferior quality; the plaintiffs, who had resold the barley, with a similar warranty, could recover of their vendors the loss sustained by the sub-vendees, measured by the difference in value between the inferior crop produced and that which might have been produced from "chevalier" barley. The case of Passinger v. Thorburn was approved in Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403, and was said by the court to be decisive of the case then under consideration. In Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438, and Flick v. Wetherbee, 20 Wis. 392, the rule adopted in Passinger v. Thorburn was approved and applied by the court. We think the case of Passinger v. Thorburn should be adhered to. It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principle. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted

[82] Part of the opinion is omitted, and the statement of facts is rewritten.

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from the breach. Masterton v. Mayor, etc., 7 Hill, 61, 42 Am. Dec. 38; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Messmore v. N. Y. Shot & Lead Co., 40 N. Y. 422. But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in Passinger v. Thorburn are incapable of being ascertained with reasonable certainty by a jury?

The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted, under similar circumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these, and other circumstances, may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind.

The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion that this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values. * * *

STEVENS et al. v. YALE.

(Supreme Court of Michigan, 1897. 113 Mich. 680, 72 N. W. 5.)

The plaintiffs, retail druggists, purchased of defendant an order of toilet preparations, "beautifiers for women," and defendant agreed to print plaintiffs' names at the bottom of all defendant's advertisements in the Detroit papers as carrying defendant's preparations for sale. Breach, that after eight months defendant ceased to so print plaintiffs' names, and inserted instead that of another house as wholesale agents in Detroit. Action to recover damages for failure to so print plaintiffs' names. Verdict directed for defendant.

HOOKER, J.[88] * * * We need not discuss the question of the validity of this contract. If it be treated as valid, and it be admitted that there was a breach of the contract by the defendant, the damages sought to be recovered were speculative. The injury suffered, if any, was a loss of such profits as would have resulted from advertising,—a matter of mere conjecture, depending upon the number who might read and act upon the advertisement. * * *

We have held in several cases that loss of profits may be recovered where the loss of profits and their amount can be shown with certainty. But here the effect of this failure to advertise is most uncer-

[88] Part of the opinion is omitted, and the statement of facts is rewritten.

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tain, and the circuit court was correct in holding that such damages were not recoverable.

Counsel for the defendant urge that a new trial should be granted because the plaintiff was entitled to nominal damages. This action was commenced in circuit court, and under the statute the plaintiff would not be entitled to costs upon a judgment for nominal damages, and the judgment should not be reversed upon this ground. Hickey v. Baird, 9 Mich. 38. * * *

WRIGHT v. MULVANEY.

(Supreme Court of Wisconsin, 1890. 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393.)

The plaintiffs were fishermen in Green Bay, and had a pot net set near the direct route from the mouth of the Oconto river to Peshtigo Harbor. The defendant negligently ran into the net with a steam tug and injured it while en route to Peshtigo Harbor.

LYON, J.[84] * * * There is, included in the judgment, $200 for damages to the plaintiffs' business resulting from the injury to their net—that is to say, for loss of the profits of their business during the time necessarily required to restore the net. The net was never restored, and the plaintiffs' fishing in that vicinity for the remainder of the season was all done with another net located about one-half mile south of the injured net. The testimony tends to show that the plaintiffs lifted the pot of their net and took the fish therefrom about every alternate day before the injury; that the profits of each lift were from $40 to $50; and that it would have required about 10 days to restore the injured net, had it been restored. There was no other testimony introduced bearing upon the question of profits. Hence, the jury necessarily assessed the damages to plaintiffs' business on the basis of four or five lifts of fish, at a profit of from $40 to $50 each. There was no testimony as to whether the conditions of successful fishing remained for 10 days after the injury as favorable as they were immediately before the same,—none to show that the weather continued favorable during the 10 days; that storms did not intervene to interrupt the business; that the fish continued to run over the same ground in equal abundance; that other fishermen operating in the vicinity were equally as successful in their business after as before the injury; nor that the market price of fish remained as high. Without any testimony concerning these essential conditions, the jury must have made their assessment of damages to plaintiffs' business largely upon mere conjecture. They must have assumed without proof that a business proverbially uncertain in results, depending for its success upon nu-

[84] Part of the opinion is omitted, and the statement of facts is rewritten.

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merous conditions which the persons engaged therein cannot control or influence, and the presence or absence of which at a future time cannot be foretold with any degree of accuracy, would have continued after the net was injured to be just as profitable as it was before the injury. Such an assumption, under such circumstances, is unwarranted in the law, and probably we should be compelled to reverse this judgment for want of sufficient evidence to support the assessment of damages for profits, even though it should be held that, under proper proofs, the plaintiffs might recover prospective profits. But we are of the opinion that prospective profits cannot properly be awarded as damages in this case. The reason therefor has already been suggested, which is that under any state of the testimony, in view of the character and conditions of the business, the jury could have no sufficient basis for ascertaining such prospective profits. At best, the assessment thereof must necessarily rest largely upon conjecture. This feature of the case brings it within the rule of Bierbach v. Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19, and Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885, and the cases cited in the opinions therein. In the latter case, Mr. Justice Taylor has pointed out the distinction between that case and those cases in this court in which prospective profits have been allowed as damages. It is unnecessary to repeat the discussion here. It is sometimes quite difficult to determine to which of the above classes a given case belongs, and such determination must be governed largely by the special circumstances of each particular case. The jury assessed the damages to the net at $110. This includes not only the cost of repairing it, but also the value of the services of the plaintiffs and their servants in resetting it. We conclude that the plaintiffs are entitled to recover no other damages, except the value of the use of the net during the time they were necessarily deprived of its use, which was about 10 days. * * *

DENNIS v. MAXFIELD et al.

(Supreme Judicial Court of Massachusetts, 1865. 10 Allen, 138.)

The defendant employed plaintiff as master of a ship on a whaling voyage of five years' duration, compensation to be a per cent. on the net proceeds of the whole cargo and on all sperm oil taken, with a provision for additional sums in proportion as the cargo might exceed $70,000. The vessel sailed May 17, 1858, but plaintiff was wrongfully deposed at the Sandwich Islands on November 20, 1860. On the trial, no evidence was presented of what the vessel afterwards actually earned, but some evidence was presented in support of plaintiff's claim for damages beyond the earnings already had at the time he was deposed.

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BIGELOW, C. J.[85] * * * The plaintiff has a right to recover as damages the amount which is lawfully due to him under the stipulations by which his compensation for these services was to be regulated and governed. This includes the wages which he had earned previous to his removal, as well as those which he was prevented from earning by his wrongful discharge. The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract. Indeed his right to recover anything, as well that which was earned before as that which would have been earned if he had not been discharged, depends on the question whether he has performed his part of the contract. A party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action. We are therefore all of opinion that the sum due to the plaintiff prior to his discharge, when it shall have been ascertained by an assessor, ought to be added to the amount of the verdict.

We think it equally clear that the plaintiff is entitled to recover in this action his share or proportion of the future profits or earnings of the vessel after his discharge by the defendants. These constitute a valid claim for damages, because the parties have expressly stipulated that profits should be the basis on which a portion of the plaintiff's compensation for services should be reckoned. These earnings or profits were therefore within the direct contemplation of the parties, when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of co-partnership, that the profits of the contemplated business were uncertain, contingent and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or in an action on a policy of insurance on profits, would it be a valid defence in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is, that in such cases the parties, having by their contract adopted a contingent, uncertain and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we

[85] Part of the opinion is omitted, and the statement of facts is rewritten.

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do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits or a share of them, no recovery can be had on such a contract in a court of law—a proposition which is manifestly absurd. * * *

LUND v. TYLER.

(Supreme Court of Iowa, 1901. 115 Iowa, 236, 88 N. W. 333.)

Action to recover damages for assault and battery. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

McCLAIN, J.[86] * * * Plaintiff, as a witness, testified that at the time of the injury he was engaged in fishing for a living, and that he lost two weeks' time in consequence of defendant's acts. Appellant argues that plaintiff was improperly allowed to answer as to the reasonable worth of his time. Certainly plaintiff might recover for loss of earnings during the time. The business was one involving not speculative profits but mainly the personal efforts of the plaintiff, the profits in which could be considered as earnings, and therefore loss of time therein might be shown as resulting in loss of earnings. Kinney v. Crocker, 18 Wis. 74, 82. It seems to us that the question properly called for an answer as to what plaintiff's reasonable earnings during such time would have been. If defendant desired more specific information, he could have secured it by cross-examination. * * *

RICHMOND & D. R. CO. v. ALLISON.

(Supreme Court of Georgia, 1890. 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43.)

Allison sued the railroad company for damages for personal injuries. He alleged in his declaration, among other things, that, at the time he was injured, he was a postal clerk earning $1,150 a year, with prospects for an immediate promotion to a salary of $1,300 a year, and excellent prospects for promotion in his life beyond the highest wages paid to postal clerks; and that, when he was hurt, he was 22 years old. Judgment reversed.

SIMMONS, J.[86] * * * The view we take of the case renders it unnecessary to discuss any of these grounds except the fifth and the ninth. The fifth is as follows: "Because the court erred in charging the jury as follows: 'Another item of damages alleged by the plaintiff is for permanent injuries. He says that he has been permanently injured, and, by reason thereof, his capacity to work and earn money by his labor throughout his future life has been practically destroyed.

[86] Part of the opinion is omitted.

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If this be true he would be entitled to further compensation on that account. The burden is on the plaintiff to show the fact that his capacity to labor and earn money has been permanently impaired, and the extent of such impairment, or to furnish data to the jury, from which they may be able to ascertain his financial loss in this respect. In passing upon this question, you would ascertain from the evidence whether the plaintiff's capacity to labor and earn money is, in point of fact, practically destroyed, or in part impaired, by his injuries, and, if so, the extent of such impairment, and whether it will extend to the future, and through the remainder of his life; and, if you so find, you will award him such a sum as you think reasonable and just, in view of the evidence and the extent of such injury, and in view of all the facts and circumstances of this case, as disclosed to you in the evidence. If you believe from the evidence that the plaintiff has not suffered any permanent injury as the result of the injuries mentioned in the evidence, you would not allow him anything in the way of damages for a permanent injury. No fixed rule exists for estimating this sort of damage. The plaintiff's age, his habits, his strength, sex, vocation, the rate of wages earned by him in the past by his labor, his prospects of obtaining steady, remunerative employment in the future, prospects of increased earnings in the future by additional experience and skill acquired, if there be evidence on this point, and that evidence, in your opinion, is definite and tangible, these circumstances in so far as they may be illustrated by the evidence, are all circumstances proper to be taken into account.'" The plaintiff in error objects to that portion of the charge set out which says, "No fixed rule exists for estimating this sort of damage," and insists that a fixed rule does exist, to wit, that such a sum should be allowed the plaintiff as would make his future income the same as it would have been had he not been injured, taking into consideration the probabilities of disease, decreased capacity to labor, and the duration of life. It is insisted that the charge, as given, puts no limit upon the finding of the jury; that, while it calls to their attention elements which they could consider, it does not restrict them by the fixation of a principle which should control their conclusion. This court has considered this question upon different occasions, and in several cases has said that there is no "Procrustean rule," or fixed rule, in cases of this kind. * * *

The last case in which the question was considered was Railway Co. v. Freeman, 83 Ga. 586, 10 S. E. 277, where the exact words complained of were approved by this court. Upon the request of counsel for the plaintiff in error, we allowed him to review that decision. We have carefully considered his argument, and have devoted much time to reading the text-books and reports of cases decided by other courts, to ascertain if we could find any authority or decision holding that there is a fixed rule to be given to the jury, which must control them in estimating the damages to a person who has been permanently

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injured by the carelessness and negligence of a railroad company, or natural person, but we have been unable to find a decision of any court, or a dictum of any text-writer, holding that there is a fixed rule for measuring the damages in such cases; and, in the nature of things, it is impossible for a court to prescribe any fixed rule, because it is impossible to prove such exact data as would authorize a court to prescribe one. It is impossible for any witness to testify to the exact time that the injured person would have lived, if he had not been injured. It is impossible to say whether the person would have remained in good health during his whole life, or whether he would have lost little or much time by sickness or idleness or the loss of an opportunity to labor. It is impossible to say whether he would have continued to earn the same amount of money during his whole life; whether he would have earned more, and how much more, or less, and how much less; whether he would have remained in the same occupation, or would have abandoned that, and pursued another more lucrative, or less so. Unless these and other facts which might be enumerated could be shown the jury, we do not see how a fixed rule to measure the damages for a permanent injury could be prescribed to the jury. It may be said, however, that the life tables put in evidence would show a man's expectancy of life, and that the amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule; but we do not think that this would in all cases be fair, either to the plaintiff or to the railroad company. If the plaintiff were a young man of character and capacity and industry, and had chosen his occupation, and commenced its pursuit, his yearly income at first might be small, but in a few years, he might be able to increase it very largely; yet, under the rule contended for he would be confined during his life to the small income he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person, making a large yearly income, it would be unfair to the railroad company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery; because our experience shows that a man in declining years has not ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability, and indisposition to labor come upon him more and more each year, as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the railroad company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule.

On the contrary, in the important and much-considered case of Phillips v. Railway, above cited [4 Q. B. Div. 406, 5 Q. B. Div. 78, 5 C. P. Div. 280, and 49 Law J. Q. B. 233], the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it

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would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof. We therefore think that it is better for both parties to let the jury look at these things as a whole, in the light of common sense and their own experience, and let them make such a compensation in their verdict as would be reasonable and just to both parties, not giving to the plaintiff a large sum with the purpose of enriching him, but compensating him for the loss of money which he would probably earn had he not been injured, and thereby prevented by the negligence of the defendant. These remarks, of course, apply only to the measure of damages for the permanent injury. It is not contended that any fixed rule can be prescribed as a measure of damages for pain and suffering. We therefore reaffirm the ruling in Railroad Co. v. Freeman, supra. * * *

The ninth ground complains that the court erred in admitting the following evidence, over the objection of counsel for the defendant, to wit: "Question. How soon after his injury [referring to Mr. Allison] were there any vacancies to which promotions could have taken place? Answer. Vacancies were shortly afterwards; say certainly in the course of the next three to six months, I think, after Allison was hurt. According to Mr. Allison's standing, and the classification which I give, his prospects for promotion to one of these places was good." The defendant objected to this testimony, and all other evidence of the witness, tending to show prospects of promotion, as being simply the opinion of the witness, and showing a possibility too remote to be the basis of consideration by the jury in finding damages. We think this exception is well taken, and that the court erred in allowing the testimony complained of to go to the jury. The testimony of this witness shows, in substance, that he was the assistant superintendent of the railway mail service of the fourth division; that Allison was a postal clerk under him, and that he had special supervision of Allison's record and work; that the next class above Allison in the line of promotion at the time he was injured was "class 5," and that the salary in that class was $1,300 a year; that Allison was receiving, when injured, $1,150; that Allison's standing in regard to the basis of promotion was "first-class"; that there was no vacancy in the class above Allison at the time he was injured, but two vacancies occurred in the course of from three to six months thereafter; that there were three men of Allison's class, including Allison, and that the other two stood as well as he did, and both were older than Allison. One had been in the service longer and the other a shorter time than Allison. Political considerations enter somewhat into the appointment of clerks. The promoting power is at Washington; the office here is the recommending power A vacancy in the class above Allison might be filled sometimes from other routes, and men taken from another route, and put in, who occupy, say, a second rank. It

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is in the power of the department under the rules to do that. There is no certainty at all when there is a vacancy in a position of chief clerk (the clerk in charge), that one of a lower grade on the same route will go up; no more than in any other business. It is not guaranteed. We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from $1,150 to $1,300 too remote, to go to the jury, and for them to base a verdict thereon. While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy clerk of this court, for example, is very efficient and faithful, and, if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility, or probability, of his appointment to fill a vacancy in the office of clerk, especially as the personnel of the court, upon which such appointment must depend, might change in the mean time. To allow the jury to assess damages in behalf of the plaintiff, on the basis of a large income arising from a public office which he has never received, and which is merely in expectancy, and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong, and unjust to the defendant. We believe the rule of most of the railroads in this state is to promote their employés. An employé commences at the lowest grade, and, if he is competent, capable, and efficient, he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were injured, would he be allowed to prove, unless he had a contract to that effect, that his prospects of promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary, which he had never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them, in case of vacancy, and promoted above them. So it could not be said that he was in the direct line of promotion. Pierce, R. R. 303; Brown v. Cummings, 7 Allen (Mass.) 509; Boyce v. Bayliffe, 1 Camp. 58; Brown v. Railway Co., 64 Iowa, 656, 21 N. W. 193. * * *[88]

[88] See, also, Hoey v. Felton, ante, p. 167.

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NEW JERSEY EXPRESS CO. v. NICHOLS.

(Court of Errors and Appeals of New Jersey, 1867. 33 N. J. Law, 434, 97 Am. Dec. 722.)

DEPUE, J.[89] * * * The plaintiff, on his examination in chief, after proving that his business was that of an architect, was asked the following question: "What was your average annual profits in your business?" To which he answered, "The average was about twenty-five hundred dollars—that is, the average income." When the deposition was offered to be read in evidence, the defendant's counsel objected to the reading of this question and answer, for the reason that, if read in evidence, and allowed by the court to be considered by the jury, it would tend to lead the jury to an indefinite inquiry, which would be contrary to law. The court overruled the objection, and permitted the question and answer to be read to the jury. In actions founded on contract, evidence of the loss of profits resulting from nonperformance has, in some instances, been rejected as too speculative and uncertain to be made the means of arriving at compensation as the measure of damages. But in actions of tort where the quantum of damages is very much within the discretion of the jury, evidence of the nature and extent of the plaintiff's business, and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury, to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury. * * *

The plaintiff was an architect—a business depending on his personal services as much as that of a common laborer, a clerk or a mechanic, and his emoluments were the result of his own earnings. By reason of the injuries he received, he was for a time incapacitated from pursuing his occupation, and sustained damages by reason thereof. These damages resulted proximately from the wrongful act of the defendant's servants, and obviously should be included in the compensation to be awarded to him. To what extent he had sustained pecuniary injury in that respect must depend upon the nature and extent of his business; and the jury would not be in a condition to reach any correct conclusion on that subject, unless they had before them some evidence of the value of the services to himself.

The evidence was competent in the cause to go to the jury, to be taken into consideration by them, and allowed such weight as they, in the exercise of good sense and sound discretion, should think it entitled to. * * *[90]

[89] Part of the opinion is omitted.

[90] On the general subject of certainty as to profits unearned, see, also, Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124 (1894);

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SECTION 3.—ENTIRETY OF RECOVERY.

I. Coexistence of Wrong and Loss.

NATIONAL COPPER CO. v. MINNESOTA MINING CO.

(Supreme Court of Michigan, 1885. 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333.)

Plaintiff and defendant owned adjacent copper mines. The defendant broke through into plaintiff's mine in about 1871, having in 1870 begun to "rob" the mine; i. e. stripping all the mineral to be found and allowing the ground to settle. The plaintiff did practically no mining from that date until 1880, when it decided to resume. Pumps were put in to remove the accumulation of water, but were insufficient to do so, the water gaining over them each year, until in 1883 a large hole was found from the defendant's to the plaintiff's mine at the fourth level, through which all the accumulation of water from the defendant's abandoned and sunken mine was pouring. This was the same hole which one witness had seen in 1870 or 1871 about a foot wide, which another witness in 1872 knew to be about 6 by 5 feet, and which was now in size 20 by 12 feet. It had been produced by defendant's blasting.

Cooley, C. J.[91] * * * The defendant pleaded the general issue with notice that the statute of limitations would be relied upon. The plaintiff recovered a large judgment.

The time limited for the commencement of suit for trespass upon lands in this state is two years from the time the right of action accrues. How. Ann. St. § 8714. This action was commenced in May, 1884, and it is not claimed that damages for the original trespass can

Greene v. Goddard, 9 Metc. (Mass.) 212 (1845); Love v. Ross, 4 Call (Va.) 590 (1795); Ætna L. I. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91 (1882); Wakeman v. Wheeler & W. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676 (1886); Ferris v. Comstock, 33 Conn. 513 (1866); Winslow v. Lane, 63 Me. 161 (1873); Hitchcock v. Sup. T. of K. of M. of the World, 100 Mich. 40, 58 N. W. 640, 43 Am. St. Rep. 423 (1894). As to other uncertainties, see Belair v. C. & N. W. R. R. Co., 43 Iowa, 676 (1876); Richmond & D. R. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728 (1893); Brown v. Cummings, 7 Allen (Mass.) 507 (1863); Telegraph Co. v. Crall, 39 Kan. 580, 18 Pac. 719 (1888); Mizner v. Frazier, 40 Mich. 592, 29 Am. Rep. 562 (1879); Hoey v. Felton, 31 Law J. C. P. 105 (1861). As to uncertainties in the growth of crops, see Ferris v. Comstock, F. & Co., 33 Conn. 513 (1866); Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438 (1871); Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508 (1882); S. & E. T. Ry. Co. v. Joachimi, 58 Tex. 456 (1883). On the rules of certainty as applied to the ascertainment of professional incomes, see Walker v. Erie R. R. Co., 63 Barb. (N. Y.) 260 (1872); Nebraska City v. Campbell, 2 Black (U. S.) 590, 17 L. Ed. 271 (1862); Wade v. Leroy, 20 How. 34, 15 L. Ed. 813 (1857); Ballou v. Farnum, 11 Allen (Mass.) 73 (1865).

[91] Part of the opinion is omitted, and the statement of facts is rewritten.

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be recovered in it. The contention of the plaintiff may be succinctly stated as follows: (1) Had the plaintiff instituted suit within two years from the original trespass, the recovery would have been limited to such damages as were the direct and immediate result of the trespass. The subsequent flowage of water through the opening was not the direct, immediate, or necessary result of breaking down the barriers; therefore no damages could have been recovered therefor in an action so brought. (2) Two trespasses may be the result of one act. In other words, one trespass may cause another, and he who commits the wrongful act in such a case will be responsible for both trespasses. (3) In this case no action accrued for the flowage of water into the plaintiff's mine until the flowage actually took place, but when the flowage occurred as a result of defendant's wrongful act it was a trespass, and if it continued from day to day there was a continuous trespass for which repeated actions might be maintained.

Upon these positions the plaintiff plants its case, and unless they are sound in law the recovery cannot be supported. All right of recovery for the original trespass, which consisted in breaking through into the plaintiff's mine, was long since barred, and it is not claimed that there was, from the time of the first wrong, a continuous trespass which can give a right of action now. The merely leaving an opening between the two mines is not the wrong for which suit is brought, but it is the flowing of water through the opening which is complained of as a new trespass; the original wrongful act of the defendant in breaking through being the cause, and the injurious consequence when it happened, connecting itself with the cause to complete the right of action.

In support of its contention that the case before us may be regarded as one of continuous trespass from the first, several authorities are cited for the plaintiff, which may be briefly noticed. Among them is Holmes v. Wilson, 10 Adol. & E. 503. It appeared in that case that a turnpike company had built buttresses on the plaintiff's land for the support of its road. The act was a trespass, and the plaintiff recovered damages therefor; but this, it was held, did not preclude its maintaining a subsequent action for the continuance of the buttresses where they had been wrongfully placed. The ground of the decision was that in the first suit damages could be recovered only for the continuance of the trespass to the time of its institution. There could be no legal presumption that the turnpike company would persist in its wrongful conduct, and consequently, prospective damages, which would only be recoverable on the ground of such persistent wrongdoing, would not have been within the compass of the first recovery. * * *

In Adams v. Railroad Co., 18 Minn. 260 (Gil. 236), and Troy v. Railroad Co., 23 N. H. 83, 55 Am. Dec. 177, railroad companies which, by trespass, had entered upon the lands of individuals and constructed and begun the operation of railroads, were held liable as trespassers

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from day to day so long as the operation of the road was continued. The principle of decision in all these cases is clear and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day; the plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed.

To make these cases applicable, it is necessary that it should appear that the action of the defendant has been continuously wrongful from the first. Whether it can be so regarded will be considered further on. The plaintiff, however, does not, as we have seen, rely exclusively upon this view. Its case is likened by counsel to that of a farmer, whose fences are thrown down by a trespasser; the cattle of the trespasser on a subsequent day entering through the opening. In such a case it is said there are two trespasses: the one consisting in throwing down the fences, and the other in the entry of the cattle; and the right of action for the latter would accrue at the time the entry was actually made. The plaintiff also cites and relies upon a number of cases in which the act of the party which furnishes the ground of complaint antedates the injurious consequence, as the original trespass in this case antedated the flowing from which the plaintiff has suffered damage.

One of these cases is Bank of Hartford Co. v. Waterman, 26 Conn. 324. In that case action was brought against a sheriff for a false return to a writ of attachment. The falsity consisted in a misdescription of the land attached. When suit was brought the period of limitation, if it was to be computed from the time the return was made, had already run; but under the statute the plaintiff was entitled to bring suit only after he had taken out execution and had a return made upon it, which would show a necessity for a resort to the attached lands. It was only after such a return of execution that the plaintiff would suffer even nominal damage from the official misfeasance; and it was therefore a necessary consequence that the time of limitation must be computed from that time, and not from the time of the false return.

Another case is that of McGuire v. Grant, 25 N. J. Law, 356, 67 Am. Dec. 49, which is to be referred to the same principle. The defendant removed the lateral support to the plaintiff's land by an excavation, made within his own boundaries. Injury subsequently resulted to the plaintiff in consequence. The statute of limitations was held to run from the time the damage occurred; the excavation not being of itself a tort until damage resulted. The case of Bonomi v. Backhouse, El. Bl. & El. 622, was like the last in principle, and was decided in the same way.

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The plaintiff also, in this connection, likens its case to that of one who, in consequence of a ditch dug upon his neighbor's land, has water collected and thrown upon his premises to his injury. It is not the act of digging the ditch that sets the time of limitation to running in such a case, but it is the happening of the injurious consequence. The case supposed, however, is not a case of trespass. The act of digging the ditch was not in itself a wrongful act. The owner of land is at liberty to dig as many ditches as he pleases on his own land, and he becomes a wrongdoer only when, by means of them, he causes injury to another. If he floods his neighbor's land the case is one of nuisance, and every successive instance of flooding is a new injury. But here, as in the case of a continuous trespass, prospective damages cannot be taken into account, because it must be presumed that wrongful conduct will be abandoned rather than persisted in, and that the party will either fill up his ditches or in some proper way guard against the recurrence of injury. * * *

The case of Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, was one of nuisance. * * * The ruling sustained the position taken for the plaintiff in the case, which was thus succinctly stated by counsel arguendo: "The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained."

The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered for it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with anything it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises and leaving houses or other obstructions there to incumber or hinder his occupation; the physical hindrances are a continuance of the original wrongful force, but the hole is only the consequence of a wrongful force which ceased to operate the moment it was made.

If, therefore, the plaintiff had brought suit more than two years after the original trespass, and before the flooding of its mine by water flowing through the opening had begun, and if the statute of limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, and there had been no repetition of the injury in the mean time to give a new

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cause of action. The mere continuance of the opening in the wall could not be a continuous damage. Lloyd v. Wigney, 6 Bing. 489.

The right of action, if any, for which the plaintiff can complain, must therefore arise from the flowing itself as a wrongful act; there being no longer any action for the original breaking, and no continuous acts of wrong from that time until the flowing began. The flowage caused a damage to the plaintiff; but damage alone does not give a right of action; there must be a concurrence of wrong and damage. The wrong, then, must be found in leaving the opening unclosed and permitting the water to flow through. It must therefore rest upon an obligation on the part of the defendant either to close the opening, because persons for whose acts it was responsible had made it, or to restrain water which had collected on its own premises from flowing upon the premises of the plaintiff to its injury. The latter seems to be the ground upon which the plaintiff chiefly relies for a recovery.

In the argument made for the plaintiff in this court stress is laid upon the fact that the damage which has actually resulted from the flooding could not have been anticipated at the time of the original trespass, and therefore could not then have been recovered for. This consideration, it is urged, ought to be decisive. But, while we agree that it is to be considered in the case for what it is worth, it is by no means necessarily conclusive. The plaintiff must fix some distinct wrong upon the defendant within the period of statutory limitation, or the action must fail; and there is no such wrong in this case unless the failure to prevent the flowing constitutes one. The original act of wrong is no more in question now, after having been barred by the statute, than it would have been if damages had been recovered or settled for amicably; nor do we see that it can be important in a case like the present, where the wrong must be found in the injurious flowing, whether there was or was not a wrong originally. If there was, it stands altogether apart from the wrong now sued for, with an interval between them, when no legal wrong could have been complained of.

The mere fact that an opening was made by the defendant between the two mines, would not of itself have been a trespass unless the defendant invaded the plaintiff's premises in making it. Each party had a right to mine on its own side to the boundary (Wilson v. Waddell, L. R. 2 App. Cas. 95); and if the plaintiff had first done so, the defendant might have done the same at the same point, and in that way have made an opening rightfully. The difference between the case supposed and this, is that here the defendant was found to have gone beyond the boundary and committed a trespass. But suppose the defendant had then made compensation for the trespass, so far as it was then damaging; how would the case have differed from the present? The opening would remain, made by the defendant, through which,

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if the water was allowed to collect in his mine, it must eventually pass; and if he was under obligation to keep it within the bounds of his own premises, he would be liable for allowing it to pass; otherwise not. The fact that compensation was not actually made for the breaking away of the plaintiff's barrier is immaterial when the statute has run, as has been already explained. * * *

The only wrongful act with which the defendant is chargeable, was committed so long before the bringing of suit that action for it was barred. Had suit been brought in due time, recovery might have been had for all damages which could then have been anticipated as the natural and probable result of the wrongful act. If the particular damages which have been suffered could not then have been anticipated, it is because it could not then be known that the defendant would cease mining operations and the plaintiff would not. There could be no flowing from one mine into the other while both were worked; and had the plaintiff ceased operations and the defendant continued to work, the defendant would have suffered the damage instead of the plaintiff. But neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. And had the plaintiff brought an action within two years from the time of trespass, its recovery would necessarily have been had with this undoubted right of abandonment in view. But a jury could not have awarded damages for any exercise of a right, and they could not, therefore, have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is damnum absque injuria.

This view of the case is conclusive; but there is another that is equally so. The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have happened. It thus appears that complete redress could have been had in a suit brought at that time; and, that being the case, the plaintiff is not entitled to recover now for an injury for which an award of means of prevention was within the right of action which was suffered to become barred. The right which then existed, being a right to recover for all the injury which had then been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new

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suit. The wrong which had then been committed was indivisible; and the bar of the statute must be as broad as the remedy was which it extinguishes. * * *

DARLEY MAIN COLLIERY CO. v. MITCHELL.

(House of Lords, 1886. 11 App. Cas. 127.)

Lord HALSBURY.[92] My lords, in this case the plaintiff, the owner of land upon the surface, has sued the lessees of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property, by causing it to subside. The defendants, before and up to the year 1868, have worked —that is to say, excavated—the seams of coal of which they were lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability, and made satisfaction. There were other subsidences after this, and, as the case originally came before your lordships, it was matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence. The parties have now, by an admission at your lordships' bar, placed the matter beyond doubt.

It has been agreed that the owner of the adjoining land worked out his coal subsequently to 1868; that, if he had not done so, there would have been no further subsidence; and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm. Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged; and the fact that the damage only manifests itself later on, by stages, does not alter the fact that the damage is there. And so of the more complex mechanism of the human frame; the damage is done in a railway accident; the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

But the words "cause of action" are somewhat ambiguously used in reasoning upon this subject. What the plaintiff has a right to complain of in a court of law in this case is the damage to his land, and by the damage I mean the damage which had in fact occurred; and,

[92] Parts of the opinions are omitted.

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if this is all that a plaintiff can complain of, I do not see why he may not recover toties quoties fresh damage is inflicted.

Since the decision of this house in Backhouse v. Bonomi, 9 H. L. Cas. 503, it is clear that no action would lie for the excavation. It is not therefore a cause of action. That case established that it is the damage and not the excavation, which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action, for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation. * * *

I think the decision of this case must depend, as matter of logic, upon the decision of your lordships' house in Backhouse v. Bonomi, 9 H. L. Cas. 503, 512; and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but, if such considerations were permissible, I think Cockburn, C. J., in his judgment in Lamb v. Walker, 3 Q. B. Div. 389, establishes the balance of convenience to be on the side of the law, as established by Backhouse v. Bonomi, 9 H. L. Cas. 503, 512. I cannot logically distinguish between a first and a second or a third or more subsidences; and after Backhouse v. Bonomi, 9 H. L. Cas. 503, 512, it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell, J., has said, and I think rightly, that he might remove every atom of the mineral.

The wrong consists, and, as it appears to me, wholly consists, in causing another man damage; and I think he may recover for that damage as and when it occurs.

For these reasons, I think that the judgment appealed from should be affirmed, with costs.

Lord BRAMWELL. * * * It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues, he must sue for all his damage—past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But, if he sustained two injuries from a blow—one to his person, another to his property; as, for instance, damage to a watch—there is no doubt that he could maintain two actions in respect to the one blow. I may apply the test I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee; that for damage to his person would remain in him. I have put the case of a trespass. The same would be true of an action for consequential damages. A man slandered or libeled by words actionable in themselves

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must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for the actionable slander, another for the personal loss—certainly if the case in Siderfin is right. But it is not necessary to decide this.

I now come to the case of where the wrong is not actionable in itself, is only an injuria, but causes a damnum. In such a case it would seem that as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act. For example, A. says to B. that C. is a swindler. B. refuses to enter into a contract with C. C. has a cause of action against A. D., who was present and heard it, also refuses to make such a contract. Surely, another action would lie. And so one would think if B. subsequently refuses another contract. Of course, one can see that frauds might be practiced. So they may in any state of law. But I cannot see why the second action would not be maintainable if the second loss was traced to the speaking. And perhaps one might apply the same test. Would not the first right of action pass to the trustees of C. if he became bankrupt? If the second loss was after the bankrupt's discharge, it would not.

There is still another class of cases to be considered, viz. those where the act causing damage is not in itself wrongful. No easier case can be taken than the above ground case of an excavation, whereby an adjoining owner's soil is let down. It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury was imminent and certain. What would be the rights of the person damaged in such a case? I think the former reasoning would apply. If there was an excavation 100 yards long, and 50 feet of the neighbouring soil fell in, the right of action would be in respect of those 50 feet, and not only in respect of what had fallen in, but what would in future fall in along the 50 feet. But, if afterwards the other 50 feet fell in, there would be a fresh cause of action. Surely, this must be so. If 10 feet at one end fell in, and afterwards 10 feet at the other, it would be impossible to say that there would not be two causes of action. If the excavation was on two sides of a square, the same consequences. The attorney-general denied this, and was driven to do so. But suppose A. owned the adjoining property on one side, and B. that which was at right angles to it; there must then be two causes of action.

Now, apply this reasoning to the present case. There are by the admission of the parties two separate and distinct damages caused to the plaintiff by the "acts"—including in that word omissions—of the defendants. One a removal of coal, and nonproviding of supports, which caused a subsidence in 1868. A cause of action accrued then. Another cause of action is the removal of coal, including, perhaps, the coal which caused the first subsidence, but doubtless also a re-

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moval of coal extending to a greater distance, and not immediately under the plaintiff's land, and the nonproviding against the consequences, which, when the adjoining owner to the defendants removed his coal, as he lawfully might (though I think that immaterial), caused a creep in the defendants' land, which in time caused the further subsidence. I think this gives a second cause of action. I think, therefore, the judgment was right.

It seems to me not to matter that the subsidence was of the same spot, nor that the immediate cause of the second subsidence was the nonexistence of coal underneath that spot. Two damages have been occasioned to the plaintiff,—one, directly and immediately by the removal of the coal under his surface; the other, by that and removal of other coal, and consequent creeping and further subsidence. The attorney general, as I have said, denied that there could be two causes of action if two different parts of the plaintiff's land subsided at two different times. But surely there must be. Suppose the two pieces belonged to different owners, as I have suggested.

Of course, one can see the danger and inconvenience that will follow. This damage accrues many years after the defendants' act or omission which has caused it. If my reasoning is right, many years hence there might be a further action from some further subsidence. But the inconvenience is as great the other way; for, if the defendants are right, it follows that, on the least subsidence happening, a cause of action accrues once and for all, the statute of limitations begins to run, and the person injured must bring his action, and claim and recover for all damage, actual, possible, or contingent, for all time.[93]

II. SINGLENESS OF RECOVERY.

(A) *In General.*

WICHITA & W. R. CO. v. BEEBE et al.

(Supreme Court of Kansas, 1888. 39 Kan. 465, 18 Pac. 502.)

HOLT, C.[94] This action was brought by defendants in error as plaintiffs, in Sedgwick district court, to recover damages to lands they had rented, by an overflow of water. In their petition they aver that in the spring of 1885 they were cultivating a tract of 40 acres off

[93] Accord: G. L. Mining Co. v. Clague, 4 App. Cas. 115 (1878); Hamer v. Knowles, 6 Hurl. & N. 454 (1861); Nicklin v. Williams, 10 Exch. 259 (1854).

See, also, Smith v. City of Seattle, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910 (1898); Church v. Paterson R. Co., 66 N. J. Law, 218, 49 Atl. 1030, 55 L. R. A. 81, following Backhouse v. Bonomi, 9 H. L. Cas. 503 (1861), and Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722, denying it. And cf. Smith v. Thackerah, L. R. 1 C. P. 564, ante, p. 12.

[94] Part of the opinion is omitted.

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the south side of the S. E.¼ of section 26, township 27 S., of range 1 W., Sedgwick county, and had fully prepared to plant corn upon it; that the said defendant railroad company had then recently diverted the water of a stream from its natural watercourse in the construction of its roadbed, and discharged it through an artificial channel; that on or about the 15th of May of said year, on account of heavy rains, a great quantity of water was discharged through this newly made channel upon the land in question; and the water, overflowing and remaining upon the same for about six weeks, prevented the plaintiffs from planting, cultivating, and growing corn and other crops thereon, and by reason thereof they have been damaged in the sum of $500. It appears, further, that, on the 17th of August following, said plaintiffs commenced an action against this defendant to recover damages caused by the water flowing through the same channel at the same time, and overflowing 60 acres of corn already planted. This action was tried, and judgment rendered for plaintiffs for $75. The defense urged, and properly raised and supported by the evidence, was that the judgment in the former action was a bar to this one. Defendant brings the case here for review. It appears that the plaintiff had rented 320 acres, half of said section 26, and that the 40 acres unplanted, for which damages are claimed in this action, was a part of this same tract, with the 60 acres which had been planted, and for which damages had been claimed and recovered heretofore. The defendant claims that the judgment obtained in the former action precluded the plaintiff from setting up any other and different damages than those claimed in that action, occasioned at the same time.

We believe the law to be well settled that no party is permitted to split his causes of action into different suits. If he does, and obtains judgment upon any part, such judgment is a complete bar to a recovery upon any remaining portion thereof. The splitting up of claims is not permitted in the case of contracts, and the same rule which prevents a party from doing so applies with equal force to actions arising in tort, and the same act cannot be the foundation for another suit, although the items of damages may be different. In this action the act complained of was the discharge of the water upon the 15th day of May; and this claim for damages might have been litigated in the first action, and should have been set forth in the petition therein. If plaintiffs neglected to do so, they should be barred from further relief. It was the same storm, and the water was discharged, through the same culvert, upon land which was a part of the same tract that plaintiffs had rented. "The principle is settled beyond dispute that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, ensuing either upon a contract or from a wrong, cannot be divided, and made the subject of

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several suits; and, if several suits be brought for the different parts of the same claim, * * * judgment upon the merits in either will be available as a bar in the other suits. * * * In case of torts, each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be." 1 Herm. Estop. § 77. If the rule were otherwise, the tract might have been divided up into 5, 10, or 15 acre tracts, and there might have been a series of vexatious law suits. "It is for the public good that there be an end to litigation." This view is well supported by authority. * * * [95]

GOSLIN v. CORRY.

(Court of Common Pleas, 1844. 7 Man. & G. 342.)

Action in case for libel by reason of advertisements of a reward for the apprehension of the plaintiff, the same charging him with fraud. The libels were published on March 31st and April 5th. The action was begun on April 19th. Defendant's counsel consented to the admission of evidence as to two arrests of the plaintiff, made on April 25th and May 13th.

The Lord Chief Justice, in leaving the case to the jury, told them, that the two arrests, being subsequent to the commencement of the

[95] Prospective damages that are certain to occur should be assessed in the first action. Fetter v. Beale, 1 Ld. Raym. 339 (1697); Richardson v. Mellish, 2 Bing. 229 (1824). And see, also, Child v. Stenning, 11 Ch. Div. 82 (1870); Howell v. Richards, 11 East, 633 (1809); Bowes v. Law, L. R. 9 Eq. 636 (1870). New actions may be brought as often as new injuries and wrongs are repeated, not as often as new damages accrue. Hambleton v. Veere, 2 Wm. Saund. 171 (1750); Hodsoll v. Stallebrass, 11 Adol. & E. 301 (1840).

Filer v. New York Cent. R. Co., 49 N. Y. 42 (1872), was an action for damages for personal injuries sustained by plaintiff's wife while alighting from defendant's train. A physician was allowed by the lower court to state what the probability was of a return of an inflammation of the muscles of the female plaintiff's back and hip, which was consequent upon the injury. The defendant assigns the admission of this testimony as error. Inter alia, Allen, J., said:

"Successive actions cannot be brought by the plaintiff for the recovery of damages, as they may accrue from time to time, resulting from the injury complained of, as would be the case for a continuous wrong or a continued trespass. The action is for a single wrong, the injury resulting from a single act, and the plaintiff was entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages; that is, compensation for all the damages resulting from the injury, whether present or prospective. The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury. To exclude damages of that character, in actions for injuries to the person, would necessarily, in many cases, deprive the injured party of the greater part of the compensation to which he is entitled. Curtis v. Railroad Co., 18 N. Y. 534, 75 Am. Dec. 258; Drew v. Railroad Co., 26 N. Y. 49. Any evidence therefore tending to show the character and extent of the injury and its probable results, as well as the probability of a return of the disease induced by the injury, in the ordinary course of nature, and without any extrinsic superinducing cause, was competent to enable the jury to determine the compensation to which the plaintiff was entitled."

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action, were not, in strictness, evidence in the cause, but that the tendency of the advertisement was to cause the plaintiff to be arrested upon the charge of fraud therein made, and that the evidence of such arrests was received with the consent of the defendant's counsel: his lordship directed them to take all the circumstances into their consideration, and, if they were satisfied that the defendant was the author of the publication, to give the plaintiff such temperate and reasonable damages as in their judgment he was entitled to upon the facts proved.

The jury having returned a verdict for the plaintiff, damages £50,

Shee, Serjt., now moved for a new trial, on the ground of misdirection.[96]

ERSKINE, J. It was open to the defendant's counsel to take one of two courses, either to agree that the jury should give damages for the whole injury, whether sustained before or after the bringing of the action—or to insist that all which occurred subsequently to the commencement of the action should be excluded from the consideration of the jury. The defendant's counsel thought proper to adopt the former course. It appears to me that, if the Lord Chief Justice had told the jury they were at liberty to give damages for the arrests, that would have been a misdirection. But there does not seem to have been any such misdirection in the case. On the contrary, the jury were cautioned that the plaintiff was not entitled to damages in respect of such subsequent arrests: but that, inasmuch as the evidence had been admitted with the consent of the defendant's counsel, it could not be altogether excluded. Taken in connection with the rest of the summing up, that amounts to no more than this, that the jury were to give the plaintiff such measure of damages as they thought him entitled to for the publication of the libel, and for the mental suffering arising from the apprehension of the consequences of the publication; merely treating the fact of his having been afterwards arrested as showing that such apprehension was just.

TINDAL, C. J., and COLTMAN and CRESSWELL, JJ., delivered concurring opinions.

(B) Continuing Torts.

KANSAS PAC. RY. v. MIHLMAN.

(Supreme Court of Kansas, 1876. 17 Kan. 224.)

BREWER, J.[1] Mihlman was the owner of a tract of land in Riley county. In December, 1866, he deeded the right-of-way through said land to the railway company, plaintiff in error, for its railroad. Prior to 1868 the road was constructed over this right-of-way. It is not

[96] The statement of facts has been rewritten.

[1] Part of the opinion is omitted.

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claimed that the road was not built on the tract deeded, nor that it was unskillfully built. The road crossed at right angles a ravine which seems to have drained quite an extent of territory, and through which ran after a heavy rain a large volume of surface-water. It does not appear to have been technically a watercourse, or that anything but surface-water ran through it. At or near this ravine the company built two culverts. Leading to and from these culverts, it, according to Mihlman's testimony, dug two or three ditches, partly on the right-of-way and partly on Mihlman's land. In 1872 and 1873, from these ditches, or in consequence of the culverts being unable to carry off all the surface-water, the land of Mihlman was flooded, and his crops destroyed; and for this damage he brought this action. It does not appear that the company entered upon Mihlman's land, or did any work thereon, at any time within five years prior to the commencement of this action. * * *

The first matter to which our attention is called, and which we shall notice, is that of the statute of limitations. Actions of trespass upon real property are barred in two years. Gen. St. 633, § 18, cl. 3. If the cause of action dates from the time the defendant entered upon the plaintiff's land and dug the ditches, and was simply for the trespass, it was barred; if from the time the injury to Mihlman's crops occurred, it would probably not be. So far as the company had acted, its action was finished when it had dug the ditches. (We are now considering the question with reference solely to what it did off its own land, and upon that of Mihlman.) It had invaded Mihlman's rights; it had committed a trespass on his lands. It was then responsible in an action for the injury it had done by that trespass. Such action might have been brought immediately, and in such action could have been recovered all damages done to Mihlman by the trespass, and which might have included the cost of restoring the ground to the condition it was before the digging of the ditches. What new act has the company since done? What wrong has it done to Mihlman's property? Nothing. Its hands have been still. It has made no new invasion of his rights. Suppose an action had been brought, and damages recovered, for the trespass immediately after it occurred: what new act of the company could now be alleged as the basis of recovery? True, the trespass has now resulted in greater loss than was then foreseen or estimated in assessment of damages; but an increase in the damages resulting adds no new cause of action. A. commits an assault and battery on B. Action is brought, and damages recovered. That ends the matter. And though B.'s sufferings are prolonged, and his injuries prove to be permanent, and of a far more serious character than was thought at the time of the recovery of damages, there can be no new action, and no further recovery. Fetter v. Beale, 1 Salk. 11. "We think this action is for an injury to a right; and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage

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was sustained by reason of the original wrong." Baron Parke, in Nicklin v. Williams, 10 Exch. 259. See, also, Northrup v. Hill, 57 N. Y. 351, 15 Am. Rep. 501. So, for the trespass, the cause of action is complete at the time, and an increase in the resulting damages gives no new cause of action. There are cases, it is true, in which the cause of action is based upon the actual occurrence of damage, and dates therefrom, and not upon or from the prior act which resulted in the damage; but these are all cases in which the prior act is itself lawful, and furnishes no cause of action, or where it is considered as a continuing act; as, where one excavates on his own land, and thereby withdraws the lateral support to his neighbor's soil and buildings, the act is itself lawful, and only becomes the basis of a cause of action for damages when it actually results in injury; and the cause of action dates, not from the time of the excavation, but from the time of the subsidence. Bonomi v. Backhouse, 96 E. C. L. 653. Here no trespass is committed. The party is simply using his own property, and using it lawfully; and it is only when he conflicts with the rule "Sic utere tuo ut alienum non lædas," that his neighbor has any cause of complaint. If after the excavation he builds on his own ground a wall which continues the support of his neighbor's soil and buildings, that neighbor has no action. The excavation therefore is not the foundation of the action, but the damage consequential upon the excavation; and no cause of action exists until the damage occurs. * * *

Counsel here would make the gist of the action the continuance of the ditch; * * * but the fact is, the wrong was done when the ditch was dug, and an omission to re-enter and fill up the ditch was a breach of no legal duty. There are cases in which the original act is considered as a continuing act, and daily giving rise to a new cause of action. Where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury. As to anything upon his own land, a party has a right to control and remove it, and if it is so much of an injury to his neighbor's rights as to amount to a nuisance, is under a legal obligation to do so; but as to that upon his neighbor's land, he has no such right, and is under no such duty. Hence the distinction between nuisance and trespass. * * *

It is true, the books speak of such a thing as a continuing trespass. In 1 Add. Torts, 332, it is said, that "If a man throws a heap of stones, or builds a wall, or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day until the incumbrance is removed." And in the case of Holmes v. Wilson, 37 E. C. L. 273, 10 Adol. & E. 503, it appeared that the trustees of a turnpike to support

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it built buttresses on the plaintiff's land. He brought an action, and recovered for the trespass. He then notified them to remove the buttresses. Failing to do so, he sued again, and it was held that the action would lie. It seems to us very doubtful whether this ruling can be sustained upon principle. As suggested by the reporter, suppose plaintiff had recovered as a part of his damages in the first action, as he properly might, the expense of removing these buttresses, and this fact had appeared in the second suit: could the action have been maintained? And what difference, we ask, does it make, whether he did actually recover for such expense? It was a proper matter of damages; it was a part of the amount necessary to place the land as it was before the trespass; he was entitled to recover it, if he proved it; and if he failed to prove it, or if after proving it the court refused to allow it, neither the failure nor the error laid the foundation for a second action. And what right does the first trespass give the trespasser to re-enter and commit a second trespass? True, in this case, the plaintiff had requested the trustees to remove the buttresses, and that might be considered a license to enter, and a waiver of the trespass. But where there is no such request, as in the case before us, how is it? If the railway company had entered to fill up the ditches, could not Mihlman have maintained his action for that as a trespass? Was he not at liberty to appropriate the benefit of the company's work in digging the ditches, and prevent any person from interfering therewith, and recover damages from any one that did interfere? It seems so to us, unquestionably. And it seems that the rule would be the same in case of such a trespass as suggesteed in Addison, of the building of a wall, or the heaping up of a pile of stones. Hence we doubt the doctrine as stated by him, and as decided in Holmes v. Wilson. At any rate, we do not think it can be extended beyond the character of trespasses there named, that is, those in which something is carried to and placed upon the land. Take this illustration: A. trespasses upon B.'s land, and digs a well. And that is a trespass very like that of digging a ditch. A. never enters upon the land again. The well is never filled up, but is permitted to remain. Twenty years thereafter, in a wet season, the water from the well soaks through the soil into a cellar, floods it, and causes damage. Is A. responsible for the damage? or does the statute bar an action? Was the digging of the well a single act, and a completed wrong? or does its existence make A. a continuous trespasser, and liable for every recurring damage? But without pursuing the discussion further, we hold that in digging the ditches on Mihlman's land the company was a trespasser; that the cause of action for that wrong was then complete, and then commenced to run; that the failure to enter and fill up the ditches, did not render the company guilty of continuing a nuisance, nor make it in any legal sense a continuous wrongdoer, and that therefore, as to any injury resulting therefrom, as shown in the record, the statute of limitations was a bar. * * *

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STODGHILL v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Iowa, 1880. 53 Iowa, 341, 5 N. W. 495.)

Christopher Stodghill was the owner of a farm of some 480 acres in Wapello county. Part of said farm consisted of a tract of 29 acres of creek or pasture land. The defendant's right of way for its railroad was located along the north line of said tract. The natural channel of North Avery creek ran across the right of way upon said tract, meandered through it, and recrossed the north line of the land and the right of way. When the railroad was constructed, bridges were built across the creek which spanned the channel and did not obstruct the passage of the water in the stream, nor divert it from where it was wont to flow. In 1874 the defendants cut a channel on the north side of their right of way and filled in the bridge where the stream entered plaintiff's land with earth, which diverted the stream into the new channel entirely, "except as the water backed through a culvert at a point where the water recrosses the right of way; the said bridge at the last named point having been previously removed, a culvert there constructed, and the stream filled in at this point, except the culvert aforesaid."

Christopher Stodghill commenced an action against the defendant for damages to his land by reason of the diversion of the stream. He recovered a verdict and judgment for one dollar and costs. The cause was affirmed upon appeal to this court. See Stodghill v. Railroad Co., 43 Iowa, 26, 22 Am. Rep. 210. Said Stodghill died in the year 1876, and by his last will and testament, which was duly admitted to probate, he devised the said 29 acres, with other of his lands to the plaintiff. This action was commenced in February, 1877, to recover damages for continuing to divert the water from the natural channel of said creek, and for a judgment, directing the abatement and removal of the embankments in the original channel. There was a trial by the court, without the intervention of a jury, and a judgment was rendered for plaintiff for one dollar actual damages, and $75 exemplary damages, and an order was made requiring the defendant to abate and remove said obstructions from the natural channel of the creek. Defendant appeals.

ROTHROCK, J.[2] 1. When the earth was deposited in the channel of the creek, and raised to a sufficient height to cover over the bridge, and make a solid embankment upon which to lay the railroad track, the water in the creek was at once turned into the new channel. The principal question in the case is whether the judgment for damages, in favor of Christopher Stodghill, was a full adjudication for all injuries to the land, not only up to the commencement of that suit, but for all that might thereafter arise.

[2] Part of the opinion is omitted.

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In Powers v. City of Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792, the question being as to what is a permanent nuisance, it was held that where it was of such a character that its continuance is necessarily an injury, and that when it is of a permanent character, that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated; that successive actions will not lie, and that the statute of limitations commences to run from the time of the commencement of the injury to the property. That was a cause where the plaintiff sought to recover damages against the city for diverting the natural channel of a stream called Indian creek by excavating a ditch in a street in such a manner that it widened and deepened, by the action of the water, so as to injure plaintiff's lot abutting upon said street. The same rule was recognized in Town of Troy v. Cheshire R. Co., 3 Fost. (N. H.) 83, 55 Am. Dec. 177. In that case the defendant constructed the embankment of its railroad upon a part of a highway. The action was by the town to recover damages. The plaintiff claimed that it was entitled to recover for the entire damages for the permanent injury. The court said: "The railroad is, in its nature, design and use, a permanent structure, which cannot be assumed to be liable to change. The appropriation of the roadway and materials to the use of the railroad is therefore a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain a highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages."

The case at bar is a much stronger illustration of what is a permanent nuisance or trespass, for which damages, past, present and prospective, may be recovered, than Powers v. City of Council Bluffs. In this case the damages, to the whole extent, were at once apparent. The water was diverted from the natural channel as soon as the embankment was raised to a sufficient height to turn the current into the new channel. The injury to the land was then as susceptible of estimation as it ever afterwards could be, and without calculating any future contingencies. In the other case, when the water commenced to flow in the new channel, the plaintiff's lots were not injured. It required time to wash away the banks and work backward before the injury commenced. It is not necessary to dwell upon this question. The rule established in Powers v. City of Council Bluffs, supra, is decisive of the case. See, also, Railroad Co. v. Maher, 91 Ill. 312. Counsel for appellees contend that the railroad embankment is not permanent, because it is liable to be washed out by freshets in the stream, and cannot stand without being repaired.

There is no evidence in this record tending to show that the embankment is insufficient to accomplish the purpose for which it was

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erected; that is, to make a solid railroad track and divert the water into the new channel. One witness testified that it is from 16 to 18 feet high. We will not presume that defendant was guilty of such a want of engineering skill as not to raise its embankments so that they will not be affected by high water. It seems to us that a railroad embankment of proper width, and raised to the proper height, is about as permanent as anything that human hands can make. Before leaving this branch of the case, it is proper to say that the acts complained of were done within the limit of the defendant's right of way, and the injury, if any, to the plaintiff's land was consequential. The defendant did not enter upon plaintiff's land to take a right of way for its railroad, and Christopher Stodghill did not bring his action to recover upon that ground. As we have a statute providing for proceedings to condemn the land necessary to be taken for right of way for railroad purposes, it may be that the mode of ascertaining the damages prescribed by the statute must be pursued. See Daniels v. Railroad Co., 35 Iowa, 129, 14 Am. Rep. 490. That question is not in this case, and we only refer to it lest we may be misunderstood.

2. Christopher Stodghill, in his petition in the former action, averred that the diversion of the stream from its natural course across said land perpetually deprived him from the use thereof, to his great damage in the prosecution of his business, and in the depreciation in value of his said farm and pasture lands, and he claimed damages in the sum of $499. The court instructed the jury in that case that they were not to consider the question in regard to any permanent damage to the land, for the reason that plaintiff had the right to institute other suits to recover damages sustained after the commencement of the action.

But the plaintiff claimed damages generally, and by his pleading he and those holding under him must be bound. Indeed, we do not understand counsel for appellee to contend otherwise. The damages being entire, and susceptible of immediate recovery, the plaintiff could not divide his claim and maintain successive actions. The erroneous instructions of the court to the jury did not affect the question. It was the duty of the plaintiff to have excepted and appealed. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of litigation." * * *

Reversed.

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JOSEPH SCHLITZ BREWING CO. v. COMPTON.

(Supreme Court of Illinois, 1892. 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92.)

In April, 1885, defendant erected a building on the lot adjacent to plaintiff's dwelling, with a roof slanting toward plaintiff's property, from which, in case of rain, water flowed against plaintiff's wall and into her cellar; the eave trough being so far below the eaves that the water ran over it. This action for damages was begun April 17, 1890.

MAGRUDER, J.[3] Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit." The question presented is whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of this suit. The rule originally obtaining at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. "Damages," D. The rule subsequently prevailing in such actions is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's Mayne, Dam. § 103; Birchard v. Booth, 4 Wis. 67; Slater v. Rink, 18 Ill. 527; Fetter v. Beale, 1 Salk. 11; Howell v. Goodrich, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict (Com. Dig. 363, tit. "Damages," D); and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the measure of damages. 5 Am. & Eng. Enc. Law, p. 16, case cited in note 2. But in the case of nuisances or repeated trespasses recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. * * *

The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages be estimated beyond the date of

[3] Part of the opinion is omitted, and the statement of facts is rewritten.

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bringing the first suit. 5 Am. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. Id. p. 20, and cases in note.

But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be maintained. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." Sedg. Dam. (8th Ed.) § 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrue up to the date of the bringing of the suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. Id. § 94. We think, upon the whole, that the more correct view is presented in the former class of cases. * * *

We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In Uline v. Railroad Co. [101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661], a railroad company raised the grade of the street in front of the plaintiff's lots so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In discussing the question of the damages to which the plaintiff was entitled the court say: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent or only such damages as she sustained up to the commencement of the action? * * * There has never been in this state before this case the least doubt expressed in any judicial decision * * * that the plaintiff, in such a case, is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced. * * *

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon its own land. It does not appear that such change

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might not be made in the roof, or in the manner of discharging the water from the roof as to avoid the injury complained of. * * * It cannot be said that the eave trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance. * * * There is a legal obligation to remove a nuisance; and the "law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct." * * *

The question now under consideration has been before this court in Cooper v. Randall, 59 Ill. 317. The action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house. It was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the dust thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof or the eave trough to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain storm. Nor is appellant's house or eave trough any more permanent than was the mill in the Cooper Case. In Railroad Co. v. Hoag, 90 Ill. 339, a railroad company had turned its waste water from a tank upon the premises of the plaintiff, where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain storms which occurred after the suit was commenced. We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention

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it was built; and damages can therefore be recovered only to the date of the action." 1 Sedg. Dam. (8th Ed.) § 93. * * * [4]

Reversed.

BOWERS v. MISSISSIPPI & R. R. BOOM CO.

(Supreme Court of Minnesota, 1899. 78 Minn. 398, 81 N. W. 208, 79 Am. St Rep. 395.)

The defendant, in 1887, placed piling in the Mississippi river opposite plaintiff's farm, which turned the current from its natural course and upon plaintiff's land, washing away the shores thereof. The plaintiff brought an action in February, 1895, and recovered a judgment, which was satisfied. In that action prospective damages were not claimed nor assessed. Four more acres since that time have been washed away, and this action is brought to recover damages therefor.

START, J.[5] * * * The plaintiff was bound to recover in his first action all the damages which he was entitled to; and if he was then entitled to recover for all injuries, past, present, and future, to his land, by reason of the acts of the defendant in placing and maintaining the piling in the river, the judgment in the prior action is a bar to this one; for the plaintiff, if such were the case, could not split up his cause of action, and recover a part of his damages in the first action, and then bring this action for the rest of them. The defendant claims that the first action was just such a case, and that the trial court correctly held the judgment to be a bar. The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act. * * *

The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury. But, where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting. Fortunately, we are

[4] Creswell, J., in Battishill v. Reed, 18 C. B. 696 (1856), said:
"The only question is whether my Brother Crowder was right in rejecting the evidence of diminution in the salable value of the plaintiff's premises [by reason of the dropping of water thereon from defendant's overhanging eaves] on the supposition that they were to remain in statu quo. I agree with my Lord in thinking that he would have done wrong if he had admitted it."

[5] Part of the opinion is omitted, and the statement of facts is rewritten.

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relieved from any uncertainty as to the application of the rule to the facts of this case by the decisions of this court; for they conclusively establish the proposition that the acts of the defendant, in placing and maintaining the piling in the river, whereby the water, logs, and ice were driven upon the shore of the plaintiff's land, were in the nature of a continuing trespass or nuisance, and that successive actions may be brought for the damages as they accrue.[6]

(C) Continuing Contracts.

BADGER v. TITCOMB.

(Supreme Judicial Court of Massachusetts, 1834. 15 Pick. 409, 26 Am. Dec. 611.)

WILDE, J.[7] This is an action of assumpsit on an account annexed to the writ, in which the defendant is debited with sundry supplies and advances furnished seamen, and for brokerage, in pursuance of a certain contract made between the parties before the charges and items in the plaintiff's account now claimed to be recovered. The defendant

[6] The following are cases wherein losses caused by the erection of railways and the like are regarded as permanent, and hence to be compensated in one action: Chicago, etc., R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341 (1884); Highland A. R. Co. v. Mathews, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462 (1892); Jacksonville, etc., R. Co. v. Lockwood, 33 Fla. 573, 15 South. 327 (1894); Allen v. Macon, D. & S. R. Co., 107 Ga. 838, 33 S. E. 696 (1899). In the following, similar losses were not regarded as permanent, and therefore were to be compensated in successive actions: Carl v. Sheboygan R. Co., 46 Wis. 625, 1 N. W. 295 (1879); Harmon v. Railroad, 87 Tenn. 614, 11 S. W. 703 (1889); Savannah R. Co. v. Bourquin, 51 Ga. 378 (1874); Hargreaves v. Kimberly, 26 W. Va. 787, 53 Am. Rep. 121 (1885). And see, also, a leading case in Uline v. N. Y. C. R. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661 (1886).

In Indiana, B. & W. R. R. Co. v. Eberle, 110 Ind. 538, 10 N. E. 575 (1887), an action brought to recover damages to plaintiff's lot occasioned by the construction of an embankment for a railroad roadbed upon the highway in front of such lot, Mitchell, J., said:

"Whether the plaintiff may recover for the permanent depreciation in the value of his property, depends upon the permanent character of the injury, and the form of the action. Where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire, as a result of the suit, the plaintiff's title to the right appropriated, we can see no reason why the damages may not be assessed on the basis of the permanent depreciation in value of the property injured, as in Henderson v. New York, etc., R. Co., 78 N. Y. 423 (1879); Lahr v. Metropolitan, etc., Co., 104 N. Y. 268, 10 N. E. 528 (1887). Where the action is in trespass, to recover for a past injury, treating the obstruction as unlawful, without any recognition of the right of the defendant to continue the obstruction, and acquire the right appropriated from the recovery and payment of a judgment, then the principles controlling the case of Uline v. New York, etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661 (1886), and the cases there cited, should govern. In that event only such damages as accrued up to the time of the commencement of the action are recoverable."

[7] Part of the opinion is omitted.

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pleads a former judgment in a suit brought by the plaintiff for the same identical cause of action; and the general question is, whether this plea is a sufficient bar. * * *

It is undoubtedly true, that only one action can be maintained for the breach of an entire contract, unless, by the terms of it, it is in its nature divisible. But if one contracts to do several things, at several times, an action of assumpsit lies upon every default; for, although the agreement is entire, the performance is several, and the contract is divisible in its nature. Thus, on a note or other contract payable by installments, assumpsit lies for non-payment after the first day; or where interest is payable annually, the payment of the principal being postponed to a future time, assumpsit lies for the non-payment of interest, before the principal becomes due and payable. In all such cases, although the contract is in one sense entire, the several stipulations as to payment and performance are several, and are considered, in respect to the remedy, as several contracts. This principle has long been well settled, although the law in this respect has been very much modified by modern decisions.

Still, however, the law seems to remain unchanged in respect to obligations to pay money by installments, so that debt will not lie till all the days of payment are past. A distinction has been made between a contract to pay five sums of twenty pounds each, on five different days, and a contract to pay one hundred pounds by five sums of twenty pounds, on different days; a distinction, as Lord Loughborough remarks, in the case of Rudder v. Price, 1 H. Bl. 550, which is merely verbal, the substantial meaning being the same in each.

After the action of assumpsit was introduced, a more liberal construction of contracts not under seal was adopted. But at first it was held, that although, where the contract was to pay by installments, assumpsit would lie on default of the first payment, yet the plaintiff was obliged to demand his whole damages, although only one of the several installments was payable; on the ground that the contract was entire, and that no new action could be maintained. * * *

A contract to do several things, at several times, is divisible in its nature; and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract.

The defendant next contends, that a running account for goods sold, money paid, etc., is an entire demand, incapable of being split up for the purpose of bringing separate suits, and the case of Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60, is relied on in support of this position; and if that case was rightly decided, we think it would maintain the present defense. But we know of no principle of law, nor of any other decided case, on which the decision in that case can be sustained. It is said that the law abhors a multiplicity of suits; and this seems to be the only ground of the decision in that case. But that reason would apply to notes of hand and other demands, unques-

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tionably several and independent. If any evils should arise from multiplying suits which might be joined, it is for the legislature to provide a remedy. There is already a law on this subject, by which a plaintiff, who brings several actions on demands which may be joined, is restricted in the recovery of his costs; and if the provisions of this law are not sufficient, it is for the legislature to supply the deficiency. As the law is, we think it can not be maintained, that a running account for goods sold and delivered, money loaned, or money had and received, at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing, from which such an agreement or understanding may be inferred. No such agreement, or course of dealing, is set up in this case, and consequently, the defendant's plea, that the cause of action in this suit is identical with that of the former action, can not be maintained.

With regard to the second ground of defense, we think the principle of law on which it depends is well settled. If the items now claimed could have been proved in the former action, the presumption is that they were so proved. But this presumption may be rebutted; and if the plaintiff can prove that the claims now made were not submitted to the referee in the former action, and that no evidence was offered to support them, he may well recover them in this action. * * *

BEACH et al. v. CRAIN.

(Court of Appeals of New York, 1848. 2 N. Y. 86, 49 Am. Dec. 369.)

Error to the Supreme Court, to review a judgment reversing a judgment for defendants in covenant. The plaintiff had granted a right of way across his land, with a covenant that he should erect a gate at the entrance of the way, and the defendants had covenanted in the same instrument to make all the repairs necessary to be made to the gate. In course of time, some person unknown took down and carried away the gate. The plaintiff requested the defendants to replace it, but they refused. He then brought an action against them on their covenant, and recovered one dollar damages. They still neglected to replace the gate, and he then brought the present action.

WRIGHT, J.[8] * * * Is the present action barred by a former recovery? The covenant of the Beaches is a continuing covenant. Their obligation is to repair the gate as often as repairs are needed, and they cannot discharge themselves from the effect of their contract, or change the rights of the parties, by a mere refusal to perform. In other words, they cannot, by such refusal, put at an end, for all future

[8] Part of the opinion is omitted.

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time, the duty imposed upon them by their covenant. Indeed, the counsel for the plaintiff in error admits, that if Crain should replace the gate, the covenant of his clients may again become operative; thus, by his admission, negativing the idea that the refusal to rebuild or replace worked, under the circumstances of this case, a total and final breach of the covenant, insomuch that the measure of damages in the former suit was, or should have been, the cost of erecting a new gate, and such sum as would be necessary to keep it in repair during the period that Crain should desire it to be kept up. Neglecting, at any time, to make necessary repairs to the gate, or to shut it in passing or repassing, would have been a partial breach of their covenant, and Crain could have recovered damages for any injury necessarily resulting therefrom. So for a like neglect, damages might be recovered for injuries accruing subsequently to the former action. It is not perceived, therefore, how a refusal to repair could change the obligations or rights of the parties, or introduce a new and different rule of damages. To constitute an effectual bar, the cause of action in the former suit should be identical with that of the present. It is the same cause of action when the same evidence will support both the actions, although they happen to be grounded on different writs. Rice v. King, 7 Johns. 20. But the evidence in both actions may be in part the same; yet the subject-matter essentially different, and in such case there is no bar. For example, if money be awarded to be paid at different times, assumpsit will lie on the award for each sum as it becomes due. So, on an agreement to pay a sum of money by installments, an action will lie to recover each installment as it becomes due. In covenant for nonpayment of rent, or of an annuity payable at different times, the plaintiff may bring a new action toties quoties as often as the respective sums become due and payable; yet in each of these examples, the evidence to support the different actions is in part the same. In this case the same covenant was the foundation of both actions; the same evidence, therefore, in part, is alike common to both; but there is this difference, in the former suit the breach was assigned, and the actual damages laid as having accrued prior to the commencement thereof; in the present, damages are sought to be recovered for a breach subsequent to such former action. In the present action, the plaintiff could not have recovered for damages that had accrued prior to the first suit, for he is not permitted to split up an entire demand, and bring several suits thereon; but he may show a breach subsequent to the former suit, and recover the actual damages arising from such subsequent breach. On the last trial, a breach of the covenant to repair subsequently to the former action was admitted, and for this Crain was entitled to recover nominal damages, with such actual damages as could be shown to have accrued from such breach since the former recovery. This must necessarily be the effect of a continuing covenant. The former recovery, therefore, could be no bar to the present suit.

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The plaintiffs in error insist that Crain did recover, or legally should have recovered, in the first suit, a sum sufficient to enable him to replace the gate. But this argument supposes that upon the Beaches' refusing to repair, there was a total breach of their covenant, and that they could relieve themselves from subsequent obligation by the payment of a gross sum in damages. If this were so, Crain's recovery should also have embraced a sum sufficient to keep the gate in necessary repair whilst it was his pleasure that it should remain; a sum that I imagine there would be insuperable difficulty to estimate. Whilst the obligation of the plaintiffs in error continued, and it was entirely practicable for them to perform, I do not well see how the value of a new gate could have legitimately formed a part of the damages to be recovered under the pleadings and evidence in the first suit. It is possible, that if Crain, for the protection of his lands, and with the view of making the default of the Beaches the least expensive to them, had, prior to such suit, rebuilt or replaced the gate, he might have recovered the cost thereof in the shape of damages. But it is enough to say that no such thing was done; neither did the law devolve upon him a duty which the plaintiffs in error had covenanted to perform, and which, in its performance, was neither difficult nor impracticable. As a matter of fact, it is obvious, from the pleadings and evidence in the first suit, and the amount of the judgment therein, that the cost of erecting a new gate was not recovered; as a matter of law, under the circumstances of this case, it ought not to have been. * * *

FISH v. FOLLEY.

(Supreme Court of New York, 1843. 6 Hill, 54.)

The plaintiff alleged that the defendant's intestate, Hubbard, covenanted to furnish sufficient water out of his milldam to run plaintiff's mill and carding machine. No power was furnished after the year 1826. The plaintiff had recovered damages for breach of the same covenant in 1835. This action was brought in 1840 to recover further damages.

NELSON, C. J.[9] As I understand this case, there has been a total failure to perform the covenants on the part of the intestate and those representing him, since the year 1826, and a recovery had for the damages arising therefrom to the plaintiff down to the year 1835, the time the former suit was brought. He now claims to recover from that time to the commencement of this action, insisting that the covenant is a continuing one, and the liability to perform on the part of the covenant or and his representatives, perpetual. I cannot assent to this construction. It is true, the covenant stipulated for a continued supply of water to the plaintiff's mills; and in this respect it may be appropriately

[9] Part of the opinion is omitted, and the statement of facts is rewritten.

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styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent or should have obtained it in the former suit. To allow a recovery again, would be splitting up an entire cause of action, in violation of established principles. Bendernagle v. Cocks, 19 Wend. 207. * * *[10]

REMELEE v. HALL.

(Supreme Court of Vermont, 1859. 31 Vt. 582, 76 Am. Dec. 140.)

The defendant, in consideration of a conveyance to him, agreed that the plaintiff and his daughter Clarissa might live with him, "with the privileges of board, fire, light and housekeeping," as long as the plaintiff and his daughter should choose. On a submission to arbitrators, they found a breach of the agreement and awarded damages, upon which award the present action is founded.

POLAND, J.[11] The first objection made to the validity of the award made by the arbitrators is, that they treated the contract between the parties, which formed the subject of difference, and of the submission, as having been so entirely broken and violated that they awarded damages for the whole period the contract was to continue, though the whole time had not elapsed. It is insisted that in the action which had been brought, or in any action which could have been brought for the breach of it before its final termination, the plaintiff could only have recovered such damage as he had sustained when he brought his suit. It is not true, however, as a general rule, that a party can not in a suit at law recover damages beyond what he has actually sustained at the time of bringing his suit, or even at the time of trial. In all cases of actions for personal injuries by the wrongful act or neglect of another, the plaintiff recovers not only for such damages as he has sustained, but for all such as he will in future suffer from the injury, and he can not bring successive actions. Nor is the principle general in its application to actions for the breach of contracts, the performance of which is to extend through a period of time which has not elapsed when the action is brought, or when the suit is tried.

The true criterion, whether a party in such action can recover damages for nonperformance of the whole contract, and so for damages not sustained when the action is brought and suit tried, is, whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely putting an end to the contract. Whether this is so or not, must depend upon the facts of each particular case, and often it is nice and difficult to determine whether the breach of such continuing contract is entire and total, so as to entitle the party to

[10] See, also, Phelps v. N. H. & N. Co., 43 Conn. 453 (1876).

[11] Part of the opinion is omitted, and the statement of facts is rewritten.

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recover damages for an entire nonfulfillment, or only partial and temporary, so that a party can recover only such damages as he has already sustained, and he must still accept the performance of the residue of the contract, if the other party will fulfill it. In the case of this contract there might be such a breach of the contract as would entitle the plaintiff to maintain an action which would not authorize a recovery as for an entire breach; some slight omission to fulfill the contract in relation to fire or lights, accidental or even negligent, but not gross or willful.

At the same time, if the defendant should wholly and absolutely refuse to keep the plaintiff for a long period of time, and compel him to furnish a house and maintenance for himself, with notice that the defendant did not intend further to perform the contract on his part, or if he should grossly and wantonly ill treat the plaintiff so that he could no longer live quietly and comfortably with the defendant, we think such a breach might well be regarded as entire, and justify a recovery of damages for the full term of the contract.

It cannot be said then, as a proposition of law, that a breach of such a contract will, or will not, entitle a party to damages beyond what he has already in fact sustained, but it becomes a question of fact for the jury to say in each case, whether the breach is entire or partial. In this case it was of course a question for the arbitrators to decide, and as every reasonable intendment is to be made to support the judgments of these tribunals of the parties' own creation, we are bound to suppose that the breach of the contract was such as to entitle the plaintiff to recover for an entire nonfulfillment. * * *[12]

[12] See, also, Ferguson v. Ferguson, 2 N. Y. 360 (1849), and Schell v. Plumb, 55 N. Y. 592 (1874).

Field, J., in Parker v. Russell, 133 Mass. 74 (1882):

"In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, 'if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole.' We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out. The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us. Judgment on the verdict for the larger sum."

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stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them." 1 Suth. Dam. (1st Ed.) 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule

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of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. * * *

HOWARD v. DALY.

(Court of Appeals of New York, 1875. 61 N. Y. 362.)

The plaintiff agreed to act at the Fifth Avenue Theater in New York for the defendant from September 15, 1870, to July 1, 1871, at a salary of $10 per week. She alleged that, though willing to perform, she was not allowed to take part, and that she had been paid nothing. From a judgment for $410, defendant appealed.

DWIGHT, C.[14] * * * The next point is, whether the plaintiff was bound, notwithstanding the defendant's act, to keep herself in readiness to perform the contract at all times, or in any form to tender her services. This inquiry involves the correct theory of the nature of the action. Does the plaintiff sue for wages on the hypothesis of a constructive service, or for damages? This question, as far as appears, has never been fully discussed in the appellate courts of this state; and, on account of both its novelty and importance, will be considered at length.

It is very plain, that if a servant has actually performed the service which he has agreed to render under the contract, he has a right to recover wages. That would have been true in the case at bar if the defendant had received her services for the stipulated period. Had he not paid her according to the agreement, her action would have been for the fixed wages. If, on the other hand, she is wrongfully discharged, and the relation of master and servant is broken off as far as he is concerned, it is clear that she cannot recover for wages in the same sense as if she had actually rendered the service. In an early nisi prius case the fiction of a "constructive" service was resorted to, and a servant discharged without cause was allowed to recover wages. Gandell v. Pontigny, 4 Campb. 375. See, also, Collins v. Price, 4

[14] Part of the opinion is omitted, and the statement of facts is rewritten.

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Bing. 132. This view has been discarded in later decisions and has been disapproved by text-writers. * * *

These cases and authorities hold, in substance, that if a servant be wrongfully discharged, he has no action for wages, except for past services rendered, and for sums of money that have become due. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed upon. Smith on Master and Servant, 96, note "n"; Elderton v. Emmons, 6 Com. Bench, 187; Beckham v. Drake, 2 Ho. Lords Cases, 606. A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. (2) He may rescind the contract; in which case he could sue on a quantum meruit, for services actually rendered. These remedies are independent of and additional to his right to sue for wages, for sums actually earned and due by the terms of the contract. This last amount he recovers because he has completed, either in full or in a specified part, the stipulations between the parties. The first two remedies pointed out are appropriate to a wrongful discharge.

To apply these principles to the case at bar, the plaintiff must have been ready and willing to continue in the defendant's service at the time of the latter's refusal to receive her into his employment. 2 Wm. Saund. 352 et seq., note to Peeters v. Opie. It is not necessary, however, that she should go through the barren form of offering to render the service. Wallis v. Warren, 4 Exch. 361; Levy v. Lord Herbert, 7 Taunt. 314; Carpenter v. Holcomb, 105 Mass. 284, and cases cited in opinion by Colt, J. Her readiness, like any other fact, may be shown by all the circumstances of the case. It sufficiently appeared by the conduct of the parties.

After the defendant had declined to give her employment, there was no further duty on the plaintiff's part to be in readiness to perform. If that readiness existed when the time to enter into service commenced, and the defendant committed a default on his part, the contract was broken and she had a complete cause of action. Tender of performance is not necessary when there is a willingness and ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. Franchot v. Leach, 5 Cow. 506; Cort v. Ambergate & R. R. Co., 17 A. & E. (N. S.) 127. This rule is recognized in Nelson v. Plimpton Fireproof E. Co., 55 N. Y. 480, 484. Her future conduct could not affect her right to sue, though it might bear on the question of damages. She was not obliged to remain in New York or in any form to tender her services after they had been once definitely rejected.

If this theory of the plaintiff's case is correct, her only further duty was to use reasonable care in entering into other employment of the same kind, and thus reduce the damages. This obligation is of a gen-

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eral nature, and not peculiarly applicable to contracts of service. The cases on this point are: Emmons v. Elderton, 4 H. L. Cas. 646; Costigan v. Mohawk & H. R. R. Co., 2 Denio, 609, 43 Am. Dec. 758; Dillon v. Anderson, 43 N. Y. 231; Hamilton v. McPherson, 28 N. Y. 76, 84 Am. Dec. 330. The uncontradicted testimony was, that this duty was discharged by the plaintiff. She made effort to procure employment, but failed. While it would be unquestionably her duty to accept, if offered, another eligible theatrical engagement, it could scarcely be expected that she should spend much time in actively seeking for employment. Having made some effort and having failed, I think that she was justified, under the known usage in that business of forming companies of actors at certain seasons of the year, and the slight prospect of success in making an engagement after the fifteenth of September, in awaiting the close of the theatrical season. How far a person who is wrongfully discharged from employment is bound to seek it is not, perhaps, fully settled. Chamberlin v. Morgan, 68 Pa. 168; King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419. In the first of these cases it is said that it is the duty of a dismissed servant not to remain idle, and that the defendant may show, in mitigation of damages, that the plaintiff might have procured employment. This seems to be a reasonable rule. Prima facie, the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or, at least, that such employment might have been found. I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found. 2 Greenl. on Ev. § 261, a; Costigan v. M. & H. R. R. Co., 2 Denio, 609, 43 Am. Dec. 758.

No such evidence having been offered by the defendant, the plaintiff should recover the whole amount of her stipulated compensation as the damages attributable to the defendant's breach of contract. This, as has been seen, is the true measure of damages. * * *

As far as any authorities are opposed to the theory maintained in the present case, they will appear to rest on the nisi prius case of Gandell v. Pontigny, already noticed. Thus in Thompson v. Wood, 1 Hilt. 96, there is a dictum of Ingraham, J., that a servant wrongfully discharged has his election to sue for wages as they become due from time to time, or for damages. This remark that he could sue for wages evidently proceeds on the discarded doctrine of "constructive service." In Huntington v. Ogdensburgh, etc., R. R. Co., 33 How. Prac. 416, there are some remarks of a similar nature by Potter, J., though there is an apparent confusion between a claim for wages, in case the contract is carried out, and for damages, in case it is broken off. The opinion of James, J., as reported in this case in 7 American Law Register (N. S.) 143, appears to be distinct in its adoption of the doctrine of constructive service. It relies on a case in Alabama (Fowler v.

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Armour, 24 Ala. 194), which distinctly holds that doctrine, and on the dictum of Ingraham, J., in Thompson v. Wood, supra. There are two or three other cases in the Southern and Western states that have followed Gandell v. Pontigny: Armfield v. Nash, 31 Miss. 361; Gordon v. Brewster, 7 Wis. 355; Booge v. Pacific R. R. Co., 33 Mo. 212, 82 Am. Dec. 160.

This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of "constructive service" is not only at war with principle, but with the rules of political economy as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness. For these reasons, if the plaintiff was discharged after the time of service commenced, she had an immediate cause of action for damages, which were prima facie a sum equal to the stipulated amount, unless the defendant should give evidence in migitation of damages.

The next inquiry is as to the rule to be followed in case the defendant's denial of the contract preceded the time for entering into the service. It is now a well settled rule that if a person enters into a contract for service, to commence at a future day, and before that day arrives does an act inconsistent with the continuance of the contract, an action may be immediately brought by the other party; and of course, without averring performance, or readiness to perform. The leading cases on that subject are Hochster v. De La Tour, 2 Ellis & Black. 678; Frost v. Knight, Law Rep. 7 Exch. 111, reversing s. c. in L. R. 5 Exch. 322; Roper v. Johnson, Law Rep. 8 Com. Pleas, 167; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Crist v. Armour, 34 Barb. 378.

In Hochster v. De La Tour the facts were, that the plaintiff had agreed to enter the service of the defendant as a courier, on June 1, 1852, and to serve in that capacity for three months, from the 1st of June, at a specified monthly salary. Before that day arrived, the defendant wholly refused to employ the plaintiff in the capacity aforesaid, and wholly discharged him from the agreement. The action was commenced on June 22, 1852. The court held that the action was well brought, on the ground that it was an act done inconsistent with the

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relation of master and servant, and, accordingly, not so much a breach of the express agreement, as of an implied contract, in no way to do any thing to the prejudice of the opposite party, inconsistent with that relation.

Another form of statement is, that the party renouncing his engagement cannot complain if the opposite party takes him at his word, and treats him as having broken the contract. This doctrine results in the rule, that the opposite party has an option either to treat the contract as subsisting, and when the day arrives for commencing to serve to offer to perform, or to regard it as immediately broken, and to sue before the day arrives. This theory of an option is not objectionable, since, before the day for performance arrives, a party would not be bound to accept other employment, if offered, as he would be if the contract were broken off after that time. The principle that governs the one case is plainly not applicable to the other.

This case, at first, met with doubt, and even adverse criticism. It was powerfully assailed by Chief Baron Kelly, of the Court of Exchequer, in Frost v. Knight, L. R. 5 Exch. 322. His arguments were carefully considered on an appeal of that case to the Court of Exchequer Chamber, where the doctrine of Hochster v. De La Tour was fully confirmed, and it is now accepted law. S. c., L. R. 7 Exch. 111. Other cases to the same effect are Danube & Black Sea Co. v. Xenos, 13 C. B. (N. S.) 825, and Wilkinson v. Verity, L. R. 6 C. P. 206. The result of the cases is stated by Cockburn, C. J., in Frost v. Knight, in the Exchequer Chamber, in the following terms:

"The law with reference to a contract to be performed at a future time, where the party bound to the performance announces, prior to the time, his intention not to perform it, as established by the cases [citing them], may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive, for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time; subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

"This is not settled law, notwithstanding any thing that may have

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been held or said in Philpotts v. Evans, 5 M. & W. 475, and Ripley v. McClure, 4 Exch. 359." Pages 112, 113.

This principle was recognized in the very recent case of Roper v. Johnson, L. R. 8 C. P. 167, where the further rule was laid down, as a deduction from the decisions above stated, that in case the plaintiff elected to treat the contract (for the delivery of coal) as broken, by the refusal of the defendant to perform prior to the days designated for delivery, the measure of damages was prima facie the difference between the contract price and the market price at the several periods fixed for delivery, notwithstanding those periods had not all elapsed when the action was brought, nor even when it was tried. The damages could be mitigated by proof that the plaintiff could have procured the coal at lower rates. As no such proof was offered, the full difference between the two rates was recovered. There is also a dictum in Brown v. Muller, L. R. 7 Exch. 323, to the same effect.

The question now under consideration was discussed in Crist v. Armour, 34 Barb. 378, and the case of Hochster v. De La Tour approved. The facts in Crist v. Armour did not involve the precise point in the case at bar, since the vendor, who had contracted to sell a quantity of cheese at a specified day, sold it to another before that day arrived, and put it out of his power to perform the contract. The principle is substantially the same, however, as that adopted in the English cases. No appreciable distinction can be stated between the present case and that of Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516. In that case there was an engagement to marry "in the fall." The defendant announced to the plaintiff, in October, that he would not perform his contract. It was held that an action commenced immediately was not premature. The opinions given by Ingalls, J., and Grover, J., do not proceed on the same theory. The view of the latter judge coincides, in substance, with that of Hochster v. De La Tour, and is the only one on which the judgment can properly be supported. The fair construction of the words "in the fall," would have given the defendant until the last day of November to perform had there been no refusal on his part. It was the renunciation of his contract in October which made the action not premature. If the case is good law, it is difficult to maintain any distinction between it and the contract of service. Chief Baron Kelly, in Frost v. Knight, supra, attempted to draw a distinction between the contract of marriage and the other contracts. This was discarded by the Court of Exchequer Chamber, which held the rule in Hochster v. De La Tour to be universal in its application to contracts to be performed at a future day; though I presume that it would scarcely be extended to mere promises to pay money, or other cases of that nature, where there are no mutual stipulations.

The whole result of the discussion may now be summed up. If the defendant in the case at bar repudiated his contract with the plaintiff after the time of performance had arrived, the plaintiff had an action for damages. Her interview with the defendant sufficiently showed

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her readiness to perform. Her action was for damages for not being permitted to work, and not for wages; and the defendant might show affirmatively, and by way of mitigation of damages, that she had opportunities to make a theatrical engagement elsewhere, which she did not accept. Without such proof she was entitled to recover the full amount of the compensation stipulated in the contract. * * *[15]

FAIL & MILES v. McREE.

(Supreme Court of Alabama, 1860. 36 Ala. 61.)

McRee agreed to let Fail & Miles cut all the pine timber on his land, they agreeing to saw and sell all lumber as soon as possible and to pay McRee one fifth of the gross proceeds. McRee alleged a breach of the entire agreement, and sued to recover damages therefor.

WALKER, C. J.[16] * * * For the breach of such a contract, but one action lies, and the plaintiff must recover in a single action his entire damages. Ramey v. Holcombe, 21 Ala. 567; Snedicor v. Davis, 17 Ala. 472; Sedgwick on the Measure of Damages, 224. Notwithstanding the period of performance had not expired at the time of the breach of the contract, and at the time of action brought, the plaintiff must recover in the single action the damages which would result from the continued and prospective failure of performance, for he cannot bring a second action. Perhaps, if the time within which the contract might have been performed had elapsed before the trial, and the amount of performance which would have transpired each year could have been ascertained, the value of the timber and lumber which would have been consumed and sold each year, estimated as of that year, would have been adopted in determining the damages; and thus injury to either party from fluctuation in value would have been avoided. But, as this case is not shown to have presented such features, the damages ought to be assessed upon the basis of value at the time of the breach. * * *

[15] Stone, J., in Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387 (1887):

"When Chidester was discharged, he had the option of one of three remedies if the discharge was wrongful: (1) He could have elected to treat the contract as rescinded, and sue on a quantum meruit for any labor he may have performed; (2) he could have sued at once for an entire breach of the contract by the defendant, in which event he would have been entitled to recover all damages he suffered up to the trial, not exceeding the entire wages he could have earned under the contract; or (3) he could have waited until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. * * * And, when wages are payable in installments, suits may be brought on the several installments as they mature."

[16] Part of the opinion is omitted, and the statement of facts is rewritten.

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ROPER et al. v. JOHNSON.

(Court of Common Pleas, 1873. L. R. 8 C. P. 167.)

The defendant in April agreed to deliver coal to the plaintiffs, in certain specified installments, in May, June, July, and August, 1872, but shortly afterwards stated his determination not to perform the contract. The repudiation was accepted as such by the plaintiffs on July 3d, when they brought this action for damages as for a breach of the entire contract.*

BRETT, J. This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times; and the action is brought for the nonperformance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods, the rule as to damages for breach of the contract to deliver is, the difference between the contract price, and the market price on the day of the breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in Brown v. Muller, Law Rep. 7 Ex. 319, to deliver goods in certain quantities on different days. The effect of the judgment in that case is that, the contract being wholly unperformed, there is a breach —a partial breach—on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of the several portions of the contract. But the case of Hochster v. De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, introduced this qualification, that, where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as breach. That complication has arisen here: the contract being for the delivery of the goods on future specified days, the defendant has before the time appointed for the last delivery declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

Now, to entitle a plaintiff to recover damages in an action upon a contract, he must shew a breach and that he has sustained damage by reason of that breach. These two are quite distinct. All that Hochster v. De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, decided was this, that, if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract, and sue for it. Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the

*The statement of facts is rewritten.

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ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me that what is laid down by Cockburn, C. J., in Frost v. Knight, in the Exchequer Chamber, Law Rep. 7 Ex. 111, involves the very distinction which I am endeavoring to lay down, viz. that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach. Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it." He then treats of the other case: "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time"—that is, from nonperformance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz., that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract. Then he goes on and shews the real distinction between the cases he has put: "Subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." He says further: "The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future nonperformance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual nonperformance may therefore, by anticipation, be treated as a cause of action, and dam-

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ages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and, though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the nonfulfillment of the contract; and, in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been or would have been diminished." He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz. "ought to have done." It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that prima facie that is the proper measure of damages; leaving it to the defendant to shew circumstances which would entitle him to a mitigation. No such circumstances appeared here: there was nothing to shew that the plaintiffs ought to have or could have gone into the market—a rising market—and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was upon precisely the same argument that the Chief Baron in Brown v. Muller, Law Rep. 7 Ex. 319, decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance; but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority, I should have come to the same conclusion. But I think we are bound by the authority of Frost v. Knight, Law Rep. 7 Ex. 111, and Brown v. Muller, Law Rep. 7 Ex. 319.[17]

[17] The opinion of Grove, J., is here omitted.

Accord: Barningham v. Smith, 31 Law T. 540 (1874); Tyers v. R. & F. I. Co., L. R. 8 Exch. 305 (1873).

See, however, Rice v. Glass Co., 88 Ill. App. 407 (1899); Long v. Conklin, 75 Ill. 32 (1874). And see article in 14 Harv. Law Rev. 428.

In Brown v. Muller, L. R. 7 Exch. 319 (1872), the defendant agreed to deliver to plaintiff 500 tons of iron during the months of September, October, and November, 1871, at the rate of 166 tons per month. He delivered none, and gave notice in August, 1871, that he did not intend to. In December the plaintiff commenced an action for non-delivery, and claimed as damages the difference on November 30th between the contract and market prices of the iron. The court stated that the plaintiff could have treated the contract as at an end in August, and could then have sued and have recovered damages for a total breach; the amount being estimated (as was done in the suit actually brought) with reference to the times when the contract ought to have

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MASTERTON v. MAYOR OF BROOKLYN.

(Supreme Court of New York, 1845. 7 Hill, 61, 42 Am. Dec. 38.)

See ante, p. 241, for a report of the case.

ROEHM v. HORST.

(Supreme Court of United States, 1900. 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.)

On August 25, 1893, plaintiff agreed to sell and defendant agreed to purchase, under four contracts, 400 bales of hops, of the crops of 1896 and 1897, to be delivered in installments from October, 1896, to July, 1898; the first, for 100 bales, covering the period from October, 1896, to March, 1897. Defendant, on October 24, 1896, repudiated all liability.

FULLER, C. J.[18] * * * The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. * * *

been performed—i. e., in September, October, and November, 1871—upon the quantity to be delivered under each installment.

[18] Part of the opinion is omitted, and the statement of facts is rewritten.

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The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a locus pœnitentiæ be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance? * * *

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. Even, if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made sub-contracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain. * * *[19] Judgment for plaintiff on all four contracts affirmed.

[19] See, also, Kadish v. Young, ante, p. 225; Bagley v. Smith, ante, p. 253; Rogers v. Parham, post, p. 532; and cases under the heading "Contracts Respecting Services."

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(D) Actions by Owner of Limited Interest.

(a) PERSONALTY.

CHINERY v. VIALL.

(Court of Exchequer, 1860. 5 Mees. & W. 288.)

The plaintiff, having bought 43 sheep on credit, left them with the vendor, who wrongfully sold them. The court held that trover could be maintained. The verdict was for £118. 19s., the value of the sheep.

BRAMWELL, B.[20] * * * But it was further urged on the part of the defendant, that, supposing trover maintainable, the damages recoverable on either count ought to be no more than were really sustained by the plaintiff, that is, the value of the sheep, minus the price he would have had to pay for them if they had been delivered to him; and that therefore £5. would be ample damages, and that a farthing would have been sufficient. Upon that point our opinion is in favor of the defendant, viz., that the plaintiff is entitled to recover no more than the real damage he has sustained. In Lamond v. Davall, 9 Q. B. (58 E. C. L. R.) 1030, the plaintiff had sold shares to the defendant which he had not accepted, and the plaintiff had resold them; it was held that after that he could not sue the defendant for goods bargained and sold. If that is so, the defendant could not maintain such an action in the present case; and as the vendor could not sue for goods bargained and sold, the result is that he could not in any form of action recover the price; and it would be singular if the same act which saved the vendee the price of the sheep should vest in him a right of action for their full value without deducting the price. The cases on this subject are well put together in Mayne on Damages, p. 215, and show that in this action it is not an absolute rule of law that the value of the goods is to be taken as the measure of damage. There are several cases which may be mentioned as illustrative of this. For instance, where a defendant, after having been guilty of an act of conversion, delivers the goods back to the plaintiff, the actual damage sustained, and not the value, is the measure of damages. So, where a man has temporary possession of a chattel, the ownership being in another, the bailee, no doubt, may maintain an action; but only for the real damage sustained by him in the deprivation of the possession. Other cases might be cited to show that there is no such absolute rule of law as to the damages in trover as that suggested. In Read v. Fairbanks, 13 C. B. (76 E. C. L. R.) 692, an unfinished ship was taken and then completed, and after its completion converted; it was held that the plaintiff was entitled to the value at the time when the defendant took it, not at the time when he converted the completed ship to his own use. To the same effect is the case of Brierly v. Kendall, 17

[20] Part of the opinion is omitted, and the statement of facts is rewritten.

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Q. B. (79 E. C. L. R.) 937; the principle deducible from the authorities being that a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction. Here the result is, that the plaintiff is entitled to recover £5. only.

It is not to be understood that, though in the present case the plaintiff cannot recover more, if a stranger had converted the goods the plaintiff would not have been entitled, as against him, to recover the whole amount of the value or proceeds. That might depend upon whether the plaintiff would be liable to the seller for the contract price; and probably in such a case he would, for there the seller would be in no default; and if he could not deliver the goods owing to the wrongful act of a third party, it may be that he could recover the whole price, and the vendee would be entitled to recover the amount from the stranger. The verdict must stand as found by the jury, but be reduced to £5.[21]

WHITE v. WEBB.

(Supreme Court of Errors of Connecticut, 1842. 15 Conn. 302.)

George Webb executed a second chattel mortgage on certain machinery to plaintiff and to Clark, who took possession thereof by their agent. A part was sold for the reduction of the mortgage debt, and the balance was taken by defendant as deputy sheriff under a writ of attachment against Austin and Dunham, in whom was the legal title by virtue of a prior unsatisfied mortgage deed, although they had never taken possession. Action in trespass and trover. Verdict for plaintiff.

HINMAN, J.[22] * * * The plaintiff was in possession of the property. He had an interest in it, acquired by his mortgage deed. He is, therefore, entitled to the possession, and to the property also, against all the world but the real owner. The defendant was a mere stranger; and surely, he cannot interfere with the plaintiff's possession, nor with his title. * * *

But it is claimed by the defendant, and insisted upon in the argument, that though the plaintiff's possession is sufficient to enable him to sustain his suit; yet the damages must be measured by the interest which the plaintiff has in the property; and, therefore, the amount of Austin & Dunham's mortgage ought to be deducted, and damages

[21] For the recovery given to the owner of limited interests in personalty, see, also, Brierly v. Kendall, 17 Q. B. 937 (1852); Johnson v. Stear, 15 C. B. (N. S.) 330 (1863); Turner v. Hardcastle, 11 C. B. (N. S.) 683 (1862); Matthews v. Discount Corp., L. R. 4 C. P. 228 (1869); Claridge v. S. S. Tramway, 1 Q. B. Div. 422 (1892).

[22] Part of the opinion is omitted, and the statement of facts is rewritten.

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given, only for the excess of the value of the property over that incumbrance. In actions of trover and trespass, for property taken and converted by the defendant, where there is no malicious motive, on the part of the defendant, but he takes the property under a claim of right, and the real dispute is, as to the title, the rule of damages is the value of the property, at the time of the conversion or taking, and interest on that sum to the time of judgment. If, however, the suit is brought by a bailee or special-property man, against the general owner, then the plaintiff can recover the value of his special property only; but, if the writ is against a stranger, then, he recovers the value of the property and interest, according to the general rule; and holds the balance beyond his own interest, in trust for the general owner. Kennedy v. Whitwell et al., 4 Pick. (Mass.) 466; Spoor v. Holland et al., 8 Wend. (N. Y.) 445, 24 Am. Dec. 37; Brizsee et al. v. Maybee, 21 Wend. (N. Y.) 144; Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670, 681, and note. * * * Affirmed.

BROADWELL v. PARADICE.

(Supreme Court of Illinois, 1876. 81 Ill. 474.)

Paradice brought replevin to recover possession of certain personal property upon which Broadwell, as sheriff, had levied to satisfy an execution in favor of one McGregor. Paradice later dismissed his suit, and this proceeding is a statutory assessment of damages for the loss of the use of the property during the time it was held under the writ of replevin.

SHELDON, J.[28] * * * The evidence was undisputed that the use of the property was worth from $18 to $25 per month. It was some 22 months from the time of taking the property from the sheriff up to that of the trial for the assessment of damages. The amount of the execution under which the sheriff had seized the property was $502.20, which was entirely unsatisfied.

By the seizure of the goods in execution, the sheriff acquired a special property in them, and might have maintained an action of trespass or trover against any one who wrongfully took them away. Wilbraham v. Snow, 2 Saund. 47a.

Had Paradice so taken the property—instead of as he did, by a writ of replevin—he would have been liable to such an action of trespass or trover, at the suit of the sheriff; and, as Paradice was a stranger, the sheriff would have recovered, as damages, the full value of the property. The rule being that, in trover or trespass, if the property be taken by a stranger, the whole value may be recovered by the special property man, he holding the balance beyond his own interest in trust for the general owner; but if the suit be between him and the

[28] Part of the opinion is omitted, and the statement of facts is rewritten.

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general owner, the latter is entitled to a deduction of the value of his interest. Russell v. Butterfield, 21 Wend. (N. Y.) 300; Brownell v. Manchester et al., 1 Pick. (Mass.) 232; White v. Webb, 15 Conn. 302; Faloln v. Manning, 35 Mo. 271; Frei v. Vogel, 40 Mo. 149.

Under this rule, the sheriff here, Broadwell, should have been allowed to recover the full value of the use of the property, although he himself had no beneficial interest therein, and personally sustained no damage. The statute contemplates that damages shall be given for the use of the property, and does not make reference to such damages as the defendant has sustained; the language of the provision being that, if the plaintiff suffers a nonsuit, "judgment shall be given for a return of the property, and damages for the use thereof from the time it was taken until a return thereof shall be made." The defendant here was the special owner of the property, but as against the plaintiff, a mere stranger, he was to be viewed only as owner, and as such, was entitled to recover the value of the use of the property, the same as if the entire ownership were vested in him.

It is said that the officer is not allowed to use property which he seizes on execution, nor is the plaintiff in execution, and therefore, neither of them is entitled to any damages for such use. It may be that they, nor either of them, suffer any damage by deprivation of the use of the property; that the accruing interest on the judgment may indemnify the execution creditor in this respect. But the general owner does sustain damage on such account. During the time the property is taken and withheld from being applied on the execution, he loses the interest on its value, which runs against him in the meantime on the judgment; and as an equivalent for the interest, it is right that he should have damages for the use of the property.

The recovery by the defendant, as before observed, is in respect of the entire interest in the property, that of both the special and general owner, and the damages recovered for the use of the property, if not for the benefit of the special owner, will be for the benefit of the general owner. All that the officer realizes in respect of the property, whether damages for its use, or proceeds of its sale, will be applied and held for the benefit of the general owner. All thereof that may remain after satisfying the execution against him, will be held in trust for the general owner.

Under the language of the statute, as defendant, appellant was entitled to recover, as damages, the value of the use of the property. We see nothing in the circumstance of this defendant being but the special owner he was, which should differ his case from that of any other defendant. Reason, analogy to the recovery of the special owner in other cases, does not justify the making of a distinction. * * *[24]

[24] See, further, Russell v. Butterfield, 21 Wend. (N. Y.) 300 (1839); Finn v. W. R. R. Co., 112 Mass. 524, 17 Am. Rep. 128 (1874); Brewster v. Warner, 136 Mass. 57, 49 Am. Rep. 5 (1883).

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(b) REALTY.

SEELY et al. v. ALDEN.

(Supreme Court of Pennsylvania, 1869. 61 Pa. 302, 100 Am. Dec. 642.)

Plaintiffs were owners of a dam and water power, and defendants were owners of a tannery higher up the stream. The action was brought for an alleged permanent injury to plaintiff's property by reason of the throwing of tan bark into the stream, the deposit filling up and obstructing plaintiff's millpond.

AGNEW, J.[25] * * * Damages for injuries to property vary also according to the nature of the claimant's right. The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property; while a tenant or one having only a possessory right, may recover for an injury to his use or enjoyment of it. Ripka v. Sergeant, 7 W. & S. 9; Schnable v. Koehler, 4 Casey, 181; Robb v. Mann, 1 Jones, 305; Williams v. Esling, 4 Barr, 486. The court below erred, therefore, in confining the proof of damages of the plaintiffs to the mere use of the water. Being the owners of the property, as well as in its actual possession and use, they had a right to all the damages flowing directly from the tort of the defendant. If, therefore, a permanent injury was created by the lodgment of the tan bark in the pool of their dam, which actually depreciated the property in value as a water power, it must affect the price or value of the land to which it belonged; and why should this not be compensated in damages? It is difficult to give a good reason against it. The plaintiffs in that case have lost just so much in the value of their property by the illegal act of the defendant. Compensation for the diminished enjoyment or use of the property for a certain number of years, is no compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself. If the land were under lease, an injury which diminished its annual profit to the tenant, and also depreciated the value of the property itself, would be the subject of a double action, in which the tenant and the landlord would each recover the amount of his own loss. Of course when an owner claims in both capacities he cannot be allowed a double compensation for the same loss; so that the damages for use must not represent in any part the damages for the permanent injury. It is the duty of the court to see that one does not overlap the other. * * *[26]

[25] Part of the opinion is omitted, and the statement of facts is rewritten.

[26] See the following English cases: Attersoll v. Stevens, 1 Taunt. 183 (1808); Shadwell v. Hutchinson, 3 Car. & P. 615 (1829); Tucker v. Newman, 11 Adol. & E. 40 (1839); Baxter v. Taylor, 4 Barn. & Adol. 72 (1832); Young v. Spencer, 10 Barn. & C. 145 (1829); Crouch v. L. & N. W. Ry. Co., 2 Car. & K. 789 (1849).

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GOODING v. SHEA.

(Supreme Judicial Court of Massachusetts, 1869. 103 Mass. 360, 4 Am. Rep. 563.)

The plaintiff was third mortgagee under a mortgage for $3,000, subject to two prior mortgages for $5,000 and $1,000, respectively. Defendant entered the mortgaged property (residences) and removed water pipes and fixtures attached to the realty, while the property was still in the possession of the mortgagor, and prior to any breach of the conditions of the mortgages. The plaintiff subsequently took an assignment of the second mortgage, sold the property under power of sale therein, and bought it in for $4,000, later conveying a part thereof for $9,400. The mortgagor became bankrupt, and his assignee had brought suit for the same trespass. The defendant contended that the plaintiff could at most recover only such sum as he had lost on his security, and that if the property were sufficient, notwithstanding prior incumbrances, to pay plaintiff his whole debt, his recovery should be but nominal. The lower court ruled that the plaintiff might recover the full damages sustained by the estate, and the defendant appeals.

WELLS, J.[27] * * * The mortgagor might undoubtedly maintain an action of trespass; and damages for the unlawful removal of fixtures would be recoverable in such action by way of aggravation. Earle v. Hall, 2 Metc. 353. For the removal of crops, or other property connected with the land, which the mortgagor himself might have removed, his right or recovery would be exclusive. Woodward v. Pickett, 8 Gray, 617. But fixtures he could not himself remove, against the right of the mortgagee, nor permit to be removed; nor can he have any right to withhold the compensation or damages for them from the mortgagee, in whom the legal title is. The mortgagee may recover their value against the mortgagor or any other party who may be responsible for their removal. Cole v. Stewart, 11 Cush. 181. Such right to recover depends upon the title, and not upon possession, or the right of present possession, of the land. The right of present possession only affects the form of action in such case. Although the mortgagor in possession may recover, in an action of trespass, for the value of fixtures removed by a stranger to the title, his right to their value is subordinate to that of a mortgagee, and therefore cannot be set up by the defendant to defeat a recovery for the same by such mortgagee. The mortgagor's right of action, based upon his possession, does not depend upon, nor necessarily include, the right to recover for the aggravation by removal of fixtures. Phelps v. Morse, 9 Gray, 207. The right to recover the value of the fixtures is separable from that to recover for "breach of the close." Bickford v. Barnard, 8 Allen, 314. It is incidental only to the action of trespass. But, as the injury affects the estate, it may be sued for directly by any one

[27] Part of the opinion is omitted, and the statement of facts is rewritten.

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in whom the legal interest is vested. A second or third mortgagee, though not in possession, has a sufficient interest in the estate to maintain an action for such an injury. Although it is true that a stranger may thus be liable to either of the several mortgagees, as well as to the mortgagor, it does not follow that he is liable to all successively. The superior right is in the party having superiority of title. But the defendant can resist neither, by merely showing that another may also sue, or has sued. If he would defeat the claim of either, he must show that another, having a superior right, has appropriated the avails of the claim to himself. The demand is not personal to either mortgagee, but arises out of and pertains to the estate; and, when recovered, applies in payment, pro tanto, of the mortgage debt, and thus ultimately for the benefit of the mortgagor, if he redeem. It differs in this respect from the claim for insurance in King v. State Insurance Co., 7 Cush. 1, 54 Am. Dec. 683, cited by the defendant. The defendant has the same means of protection against four judgments that any one has who is liable, for the same cause, to either of several parties having different or successive interests in the subject matter. Due satisfaction will discharge all the claims, if made to a party having the prior right. But neither can be defeated without some appropriation of the claim to the use of him who holds a prior right. Thus it is no defence to this suit, that the mortgagor has also a right of action; nor even that he has brought such an action; because the right of the plaintiff is superior to that of the mortgagor. A superior right in Mary A. Lewis will not avail, as the plaintiff has since become the owner of that title. Nor is the existence of a superior right in the savings bank, as first mortgagee, a defence. The defendant shows no satisfaction of that claim, no demand made upon him by the savings bank, and no authority or right from the bank to resist the claim of plaintiff here, in behalf of or for the benefit of the first mortgagee.

It is not contended that the plaintiff's mortgage has been satisfied and discharged by the proceeds of the sale under the power of sale in the Lewis mortgage. The correctness or fairness of those proceedings, and the responsibility of the plaintiff for the full value of the property, or the amount realized upon the second sale, may be open to the representatives of the mortgagor in a suit therefor; but this defendant is not in such privity as to be entitled to inquire into the relations or the state of the account, so far as it depends on equitable considerations, between the mortgagor and mortgagee.

The right of the plaintiff to recover in this action does not depend upon the sufficiency or insufficiency of his security. Until his whole debt is paid, he cannot be deprived of any substantial part of his entire security without full redress therefor. Upon the facts reported, we are satisfied that the ruling of the judge who heard the case, allowing the plaintiff the full amount of the damages to the estate caused by the removal of fixtures, was correct.

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TURRELL v. JACKSON.

(Supreme Court of New Jersey, 1877. 39 N. J. Law, 329.)

DIXON, J.[28] Byard, being the owner of a plot of land in Paterson, mortgaged it, February 2, 1871, to the Washington Life Insurance Company, which forthwith duly recorded the mortgage. Afterwards, on February 6, 1872, he executed a second mortgage thereon to Benson, which was duly registered and then assigned to the plaintiff. Subsequently Byard placed a boiler and engine upon the premises. On October 1, 1872, he conveyed the property to the Paterson Silk Manufacturing Company, which, on January 16, 1873, executed to Miller a mortgage upon the realty, and a separate mortgage, securing the same debt, upon the boiler and engine as chattels. On June 26, 1874, Miller sold the boiler and engine under his chattel mortgage, to the defendant, who immediately removed them from the premises. At the time of the sale and removal, the mortgages of the Washington Life Insurance Company and the plaintiff were past due, and the plaintiff had commenced proceedings for foreclosure in chancery, but neither mortgagee had taken possession of the premises. In October, 1874, the plaintiff purchased the property at his foreclosure sale, and entered into possession. * * * Postea to the plaintiff.

The next objection which the defendant urges is, that as there was a prior unsatisfied mortgage upon the premises, the holder of which had not waived his right to recover of the defendant for the removal of the fixtures, the plaintiff being second mortgagee only, could not maintain an action. The ground upon which a mortgagee, not in possession, may support a suit at law against the mortgagor, or his alienee, for damages resulting from acts injurious to the mortgaged premises, has not been settled in the courts of this state, and the adjudications on that subject, outside of New Jersey, are not in accord, as will be perceived by a reference to the cases already cited. Sometimes the mortgagee has been deemed the legal owner of the fee as against the mortgagor and his assigns, and so entitled to hold them responsible for any act, beyond ordinary use, injurious to the land, to the full extent of that injury; and in Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563, a third mortgagee was regarded as standing in that position, and having the right to full damages, notwithstanding the fact that the prior mortgagees had superior rights to the same damages, unless the defendant could show that some of those prior mortgagees had appropriated the damages to themselves. See, also, Byrom v. Chapin, 113 Mass. 308, and King v. Bangs, 120 Mass. 514.

For so broad a claim on behalf of a first mortgagee, technical arguments, deserving of serious consideration, may perhaps be adduced; but, I think, no subsequent mortgagee can establish a like title. The reasons which support the claim of the first mortgagee defeat the

[28] Part of the opinion is omitted.

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claim of every other one, to be regarded as the legal owner of the fee. A second mortgagee is, in law, as in equity, a mere lien holder, and in that character alone can he enforce any demand for redress.

In the case of Van Pelt v. McGraw (N. Y.) 4 Comst. 110, the right of mortgagees to maintain such suits is declared to rest upon the principle that the mortgage, as a security, has been impaired, and the damages, it is said, are to be limited to the amount of injury to the mortgage, however great the injury to the land may be. Upon this principle all mortgagees may stand, and it is recommended by the consideration that it gives to each party actually injured a remedy measured by the injury received. It obviates some technical objections, as well as some practical difficulties, which attend the rule first adverted to, and enables the courts of law to do justice by their equitable action on the case. Sometimes the facts disclosed at the trial may be of such a nature as to make it doubtful whether the damages should go to the plaintiff or to an earlier mortgagee; but, in those cases, the defendant is placed in no greater danger than is a defendant in an action upon a policy of insurance, brought by the owner, where the loss is made payable to the mortgagee, and the language of the court in such a case (Martin v. Franklin Fire Insurance Co., 38 N. J. Law, 140, 145, 20 Am. Rep. 372), indicates a mode in which all interests may be guarded: "The rights of the (earlier) mortgagee can be protected by payment of the money into court, and the insurer (defendant) may obtain indemnity against any subsequent suit by the (earlier) mortgagee, by the action of the court into which the money is paid; if actions be pending at the same time by the owner and the mortgagee (two mortgagees), the court, under its equitable powers, can so control the litigation that no injustice will be done." * * * [29] Affirmed.

[29] See, also, Salisbury v. W. N. C. R. R. Co., 98 N. C. 465, 4 S. E. 465 (1887); Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406 (1864).

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SECTION 4.—EXACT INDEMNITY AS THE OBJECT OF THE LAW.

I. VALUE.

(A) How Determined.

SMITH v. GRIFFITH et al.

(Supreme Court of New York. 1842. 3 Hill, 333, 38 Am. Dec. 639.)

NELSON, C. J.[30] * * * The defendants proposed to prove that, subsequent to the delivery of the trees to them as carriers, and the happening of the damage, it had been ascertained by dealers, that Alpine mulberry trees were in truth of trifling value compared with the prices at which they had been sold in the market; that these had been greatly inflated and disproportioned to the intrinsic value; that the trees were not worth cultivating for the purpose of raising the silk worm; that they were purchased by the plaintiff to plant as a nursery, from which to sell the production; and that the article was of no value the next year, and would not have paid the expense of cultivation. All this evidence, I am of opinion, was properly rejected, as having no legitimate bearing upon the question. * * *

COWEN, J. (dissenting). * * * This action was case, against common carriers, to recover for the loss of two boxes of Alpine mulberry trees. It was not an action by a vendor against the vendee for goods sold at an agreed price. The question, therefore, I think, stood open at the trial to all the proof which would be admissible on a quantum valebant. The market price being established, the defendants' counsel offered to prove that this depended on an estimate entirely false, more mature observation having shown that the article was in truth of no intrinsic value. If a man will purchase such an article at an agreed price, without warranty or fraud, I readily agree that he cannot reduce the price by impeaching the article as useless; but I am not prepared to admit the same rule as between bailor and bailee, where no price is agreed on in case of loss. A carrier is bound to receive and convey all goods in his line for the usual rate of compensation. I do not mention this obligation as a reason why he should not pay the value of the goods; but for saying that where they happen to be accidentally lost, he, of all persons, should be the last upon whom courts and juries ought to inflict the artificial prices of the speculator; that it should rather be confined to buyers and sellers, who are the manufacturers of such prices—a work which is entirely res inter alios in

[30] Parts of the opinion of Nelson, C. J., and of the dissenting opinion of Cowen, J., are omitted.

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relation to the carrier. But without urging any such consideration, let us consider the stronger case of buyer and seller. Take it that any article of merchandise, to all appearance of fair value, is sold for what it is reasonably worth; prima facie, I admit, the vendor shall recover the market price. It is shortly after discovered, however, that it is really worth little or nothing, from some secret cause unknown to the parties and believed not to exist at the time of sale. It seems to me this would be available as a defence, and, indeed, that it would be so, even on the principle conceded at the circuit. I am unable to distinguish between an offer to show that the trees were unfit for feeding silk worms, and an offer to show a total or partial worthlessness for any other cause. It was contended at the bar that the current price is the absolute standard; and I can perceive no other plausible ground on which a party who never bound himself by contract to pay any specific price can be concluded. It is plausible to say, the plaintiff might have got so much for a plausible article; that it was lost, and his chance to get that price was lost with it. This, if allowed, is an estoppel as well against the right to show one defect as another. It applies emphatically to the bubble trade of the country, in which prices are generally notorious, and easily made out by clouds of witnesses. A man takes an article in that trade to-day, and agrees to pay what it is reasonably worth tomorrow. On subsequent observation and experience, the bubble bursts, for the reason that it was really as worthless when purchased, as afterwards; yet it is contended that jurors are absolutely bound to say, and courts to adjudge, that such article was reasonably worth the price which a universal mistake had affixed to it. Precisely the same principle would extend to a fair looking horse which no one could ride or drive, or which was secretly laboring under an incurable disease; to mulberry trees unfit to feed silk worms, or fair looking slips for transplanting, which have lost the principles of vegetable life. I am unable to perceive why the damages can be reduced by showing an article worthless for one purpose, and yet not be at all affected by proving it worthless for all purposes. This latter I understand to have been proposed at the circuit. Let us look at other examples. A man assigns his patent of a new and famous invention for what it is reasonably worth, on a year's credit. The year comes round and it turns out that the invention had been anticipated, and the patent is therefore void. So of quack medicines, which was, I believe, put on the argument as an illustration for the plaintiff. So of a note against a man reputed wealthy, who will testify that he was utterly insolvent at the time. So also of stock in a corporation whose officers will swear that it had no assets. In all these and like cases, is it right to say that the measure of value shall be the fancy price at the day? The case of a Raphael, sold for what it is reasonably worth, but which turns out to be the picture of an inferior artist, was put, in the argument for the plaintiff, as a crowning illustration. I think it was equally unhappy with that of the quack medicines. It seems to be that

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the learned counsel confounded the price to be paid by a carrier, with the case of prices agreed by a purchaser, where there is no warranty or fraud. I do not understand that, where damages are open to an estimate on the principles of a quantum valebant, the mere fictitious value is intended by the law. And I can feel no doubt that persons who happen accidentally to injure, destroy or lose such articles, are entitled to the full benefit of the principle. In trover for a promissory note, though this court held the defendant to the sum expressed by it, they admitted that the maker's insolvency might be shown in mitigation of damages. Ingalls v. Lord, 1 Cow. 240. I understand the offer, in the case before us, as made at the trial, to imply a secret defect in these trees—i. e., high anticipations were indulged in the market, that this kind of mulberry tree would be of great consequence in the silk manufacture of the northern states, whereas it was a mere delusion of the moment, the trees being really a useless incumbrance to the premises of the cultivator; a failure in every sense, like peachum wood supposed to be braziletto. And shall I be put to show, that a carrier ought not to pay as much for the loss of the counterfeit article, as for the real one? the same for a package of bank bills on an institution secretly bankrupt at the time, as if it were sound? or for counterfeit bills, because they happen to have been so well executed as to deceive the bailor and those to whom he might innocently have paid them over, as if genuine? With deference, it seems to me there is no end to the extravagances of the principle. * * *

KOUNTZ v. KIRKPATRICK.

(Supreme Court of Pennsylvania, 1872. 72 Pa. 376, 13 Am. Rep. 687.)

AGNEW, J.[81] * * * On the 7th of June, 1869, Kountz sold to Kirkpatrick & Lyons, 2,000 barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st of December, 1869, for cash on delivery, at 13½ cents a gallon. On the 24th of June, 1869, Kirkpatrick & Lyons assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyons, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil, and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts, to pay a heavy difference for nondelivery. * * *

In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well established rule, but as this case raises a novel and extraordinary question between the true market

[81] Part of the opinion is omitted.

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value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the rule itself, before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of "value" is worth, and this worth is made up of the useful or estimable qualities of the thing. See Webster's and Worcester's Dictionaries. "Price," on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it: Id. Value and price are, therefore, not synonyms, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase market value, not market price. * * *

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C. J., in Bank v. Reese, 26 Pa. 146. "The paramount rule in assessing damages (he says) is that every person unjustly deprived of his rights, should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then

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before Judge Lewis is equally true—that is to say—when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept. Andrews v. Hoover, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory, means, it does not follow that it is, nor was it said in Girard v. Taggart, to be the only one. On the contrary, the propriety of the direction there that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in Trout v. Kennedy, 47 Pa. 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price—neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. * * *

It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December, 1869, as demanded by the defendant in his fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick & Lyons, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit, that they bought oil largely, and determined to hold it from the mar-

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ket until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: "It was our purpose to take the oil, pay for it, and keep it until January 1st, 1870, otherwise we would have been heading the market on ourselves." Mr. Long says that on the 3d of January, 1870, he sold oil to Fisher & Brothers (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December, 1869. * * *

Judgment for plaintiff for $3,753 reversed, and venire de novo awarded.

FOSTER v. RODGERS.

(Supreme Court of Alabama, 1855. 27 Ala. 602.)

The defendant sold at Montgomery to plaintiff 52 bales of cotton at 12⅝ cents per pound by sample, to be of grade "strictly good, middling to middling fair." The same was shipped from Montgomery to New Orleans, and was there found to be wet and "water-packed," so as to be nearly worthless. In this action, brought for breach of the warranty, the court admitted testimony to show what the cotton brought at public auction in New Orleans, and what the market price of cotton was in New Orleans of the grade warranted, from the date of purchase to the date of auction sale. The defendant requested instructions that such testimony was incompetent, which were refused.

GOLDTHWAITE, J.[32] There is no doubt that, on a warranty of quality, or soundness, the purchaser is generally entitled to recover the dif-

[32] Part of the opinion is omitted, and the statement of facts is rewritten.

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ference between the actual value of the article at the time of the sale, and the value which the article would have been worth at that time had it come up to the warranty. * * *

If we concede the rule insisted upon by the appellant, that the difference of value between the article sold and the article as warranted at time and place of sale is the criterion of the damages, we see no error in the refusal of the court to give the other charges requested. The evidence is, that the cotton was sold by samples on the 9th January, 1851, and it was warranted to come up to the samples. The price that it sold for in Orleans on the 5th of May, at public auction, after notice to the appellant, was certainly a circumstance tending to establish its value at that time and place; and as there was evidence of the value of the sample cotton at the same time and place, the proportion of value between the two cottons at Orleans is established. The evidence shows, also, that the relative value of the two cottons was the same in Montgomery as in Orleans, and it further shows the value of the sample cotton at the former place on the 9th January, 1851; and this being established affords the means of ascertaining the value of the other at that time and place. It was therefore proper for the jury to look to the price the cotton sold at in Orleans on the 5th May, 1851, in connection with the other evidence, in order to determine its value on the day of sale in Montgomery. * * *

JOHNSON et al. v. ALLEN et al.

(Supreme Court of Alabama, 1884. 78 Ala. 387, 56 Am. Rep. 34.)

Johnson & Thornton contracted, September 12, 1882, to sell to Allen & Jemison, at Coaling, Ala., 500 tons of coal from their mines at Coaling, at $1.50 per ton, between September, 1882, and March 31, 1883. They delivered 416 tons. They were the only persons dealing in or mining coal at Coaling, and the coal could not be had there at any price, except from them. Allen & Jemison were coal dealers at Tuskaloosa, and defendants knew that the coal was to be used there. The court admitted evidence to show the market price of coal in Tuskaloosa during the period covered by the contract, and the freight rates between Coaling and Tuskaloosa.

CLOPTON, J.[33] * * * It is the general rule, that on the vendor's failure to deliver the goods according to the contract, the measure of damages is the difference between the contract price and the market price at the place where, and the time when they should have been delivered. 2 Benj. on Sales, § 1335; Sleuter v. Wallbaum, 45 Ill. 44; Worthen v. Wilmot, 30 Vt. 555; Grand Tower Co. v. Phillips, 23 Wall. 471, 23 L. Ed. 71; Rose's Ex'rs v. Bozeman, 41 Ala. 678; Miles v.

[33] Part of the opinion is omitted, and the statement of facts is rewritten.

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Miller, 12 Bush (Ky.) 134. There are cases in which special damages may be recovered; but no special damages are claimed in this case.

As there was no market price for coal at Coaling, the place of delivery, except that made by the defendants, and as the defendants knew that the coal was purchased to be used in Tuskaloosa, this being the nearest market, the measure of damages is the difference between the market price in Tuskaloosa and the contract price, with the expense of transportation added. Grand Tower Co. v. Phillips, supra; Ward v. Reynolds, 32 Ala. 384; Foster v. Rodgers, 27 Ala. 606.

Where the goods are to be delivered by installments, and there is a failure to deliver two or more or all of the installments, the proper measure of damages is the sum of the differences between the contract and market prices, of the quantity of each installment not delivered, at the respective times of delivery, and the place of delivery; each of the failures to deliver constituting a separate and distinct breach. * * *[84]

WEHLE v. HAVILAND.

(Court of Appeals of New York, 1877. 69 N. Y. 448.)

See post, p. 514, for a report of the case.

HARRIS v. PANAMA R. CO.

(Court of Appeals of New York, 1874. 58 N. Y. 660.)

This action was brought to recover damages for the killing of a race horse while being transported upon defendant's road, across the Isthmus of Panama, through the alleged negligence of defendant.

Upon the trial evidence was given tending to show that, while the horse could have been sold for some price, there was no market price, properly speaking, for such a horse on the Isthmus. Plaintiff offered, and was allowed, to prove that the route over the Isthmus was part of a usual route to California, which was the destination of the horse in question, and also to prove the market value at San Francisco. The court instructed the jury, that they were to use the proof submitted to enable them to answer the question of the value at the time and place of the injury. *Held,* no error; that where there is a market price or value at the time and place, that is the most suitable means of ascertaining value, but not the only one (Muller v. Eno, 14 N. Y. 597, 607, 608; Parks v. Morris Ax & Tool Co., 54 N. Y. 593); but that this species of evidence could not be completely reliable where it appears that similar articles have been bought and sold, in the way of trade, in sufficient

[84] See, also, Gregory v. McDowel, 8 Wend. (N. Y.) 435 (1832); Grand Tower Co. v. Phillips, 23 Wall. 471, 23 L. Ed. 71 (1874).

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quantity or often enough to show a market value; and in the absence of such proof, proof of such value at some other place was admissible; in which case the place of destination was the most natural resort to supply the needed proof; it being resorted to, however, only to enable the jury to answer the inquiry as to the value at the place of the actual loss, great deduction being made for the risk and expense of further transportations. * * *[35]

GLASPY v. CABOT.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 435.)

On September 6, 1880, the plaintiff's schooner "Mary A" went ashore off Annisquam Harbor in a badly damaged condition. On September 13th the master made a sale (which was unauthorized and unjustified) of the vessel to Murphy for $80. He, with one Power, raised her, towed her to Boston, broke her up, and sold her hull to Cabot for $200. All three are parties defendant in this action for conversion. The market value of the vessel from St. John, the port whence she sailed, prior to her going ashore, was from $1,000 to $1,400.

FIELD, J.[36] Cabot converted to his use the hull when he purchased it in Boston, and took possession of and used it as his own. The changes in the hull, whereby its value had been increased, which had been made by Murphy after he purchased the schooner then lying on Coffin's Beach, were not made at the request of the plaintiff, and if the plaintiff had retaken or replevied the schooner from Murphy in Boston, he would have received her in the condition she was then in.

The market value of the property at the time and place of conversion, with interest from that time, is admitted to be the general rule for the measure of damages, but the damages are diminished when the property is in whole or in part delivered to the owner, or when the defendant has a lien upon it, or when the plaintiff has only a special or partial interest in it, and is not responsible over to another person for any of the damages recovered. These cases fall within neither of these exceptions.

The conversion by Murphy and those acting under him was when he purchased the schooner, and took possession of her as his own. This is a distinct conversion from the conversion of the hull by Cabot. The damages for this conversion by Murphy and his codefendant cannot be enhanced by the increased value of the schooner from the repairs and changes in her condition they made after they had converted her to their own use, but must be confined to the value of the schooner as she lay on Coffin's Beach. If damages are recovered for this conversion for the full value of the schooner as she lay on Cof-

[35] No opinion. Part of the official report is omitted.

[36] Part of the opinion is omitted, and the statement of facts is rewritten.

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fin's Beach, and are paid, the title to the schooner vests in Murphy and his codefendant as of the time when they took possession of her, and the plaintiff's right of action against Cabot is necessarily discharged. If damages are recovered against Cabot for the full value of the hull, and he pays them, it seems that these damages must be regarded as a satisfaction pro tanto of the judgment against Power and Murphy. Cabot may have his action against his vendors for the value of the hull, on the ground of an implied warranty of title, if there were such a warranty, but that is immaterial to the rights of action of the plaintiff. * * *

But if there be an exception to the general rule of damages, when an action in the nature of trover is brought against a purchaser from a conditional vendee, who has improved the property while in his possession, it is not necessarily applicable to these cases, because here the original taking was tortious. In replevin, any improvements of the property attach to and go with the property replevied. In trover, when the property has been improved in value after the conversion, the form of the action does not render it necessary that damages should be given for the improved value; and the general principle is that the damages shall compensate the plaintiff for what he has lost. The rule of confining the damages to the time of the conversion, with interest from that time, has been adopted in this commonwealth as the most satisfactory; and many difficulties are avoided which arise under any other rule, when the value of the property is fluctuating, or when the property has been improved in value or changed in form by the wrongful taker after the conversion and before the trial. In the event of successive conversions, if the value of the property at the time of the first conversion were always taken as the test of damages, then it might often happen that a defendant who had subsequently converted the property would be held to pay more than the property was worth when he converted it. The damages caused by one wrong would be measured by those caused by another. Kennedy v. Whitwell, 4 Pick. 466; Stone v. Codman, 15 Pick. 297; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268. Murphy and his codefendant had no right to convey to Cabot, as against the plaintiff, the improvements they had made upon the hull, and as the title continued in the plaintiff, we know of no cases which decide that, under the circumstances disclosed in these exceptions, Cabot is not liable in damages for the market value of the hull at the time and place of its conversion by him. The question does not arise whether the damages recoverable against Cabot can in any event exceed the whole amount of damages recoverable against Power and Murphy. The ruling of the court upon the measure of damages in the action against Cabot was correct.

The remaining question is the measure of damages in the action against Power and Murphy. These defendants converted the schooner as she lay on Coffin's Beach in Annisquam Harbor. If there was no

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market for such a vessel at Annisquam, it was her value as she lay there that the defendants are liable to pay. But in determining her value there by her value elsewhere, a reasonable allowance must be made "for the probable cost of getting her off, repairing her, and getting her" to market, "less also a reasonable allowance for diminution in her market value on account of having been ashore." These allowances were made. The risks and chances of getting her afloat and getting her to market must also be taken into account. If there was no market at Annisquam, the learned justice had a right to consider, in assessing damages, the market value in St. John, if that was the principal market, or one of the principal markets, in which such vessels are bought and sold, and it was practicable to attempt to carry her there. He had a right also to consider other markets; the test is what buyers of vessels, from St. John, Boston, or other ports, would pay for her as she lay on Coffin's Beach, if all the facts of her condition were known. If there were no direct satisfactory evidence of this, and the court was satisfied that St. John was the best market, and that it was practicable to attempt to take her there, her market value when taken to St. John could be considered; but, in addition to the allowance made from her market value in St. John, there should have been an allowance for the fair value of the risks of getting her there. If she were properly repaired for the voyage, the usual rate of insurance for such a vessel on such a voyage would be evidence of the value of the risk of taking her from the port of repair to St. John. Perhaps a fair salvage for getting her off and bringing her to a port of repair, when the salvors would be entitled to nothing except out of the property saved, would be evidence of the amount of the allowance to be made for the risk and cost of removing her to such a port. We think the rule of damages adopted was too liberal under the circumstances stated in the exceptions, and that there must be a new trial in the second action, upon the amount of damages only. Bourne v. Ashley, 1 Low. 27, Fed. Cas. No. 1,699; Saunders v. Clark, 106 Mass. 331; Coolidge v. Choate, 11 Metc. 79. * * *

TRIGG v. CLAY.

(Supreme Court of Appeals of Virginia, 1891. 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723.)

The defendants had agreed to deliver 500,000 feet of lumber to plaintiffs, who were known to them to be lumber merchants at Clinchport, Va., but refused to keep the contract upon the ground that they had given too low a price. There was no market for lumber at Clinchport, nor one practically near enough to obtain any. The plaintiffs, relying on defendants' promise, had actually placed this lumber with their customers at an advance of $1,000. The commissioner allowed the plaintiffs this sum and damages.

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LACY, J.[37] * * * In a case like this, with such circumstances as we have here, the case where there had been a contract to resell at an agreed price, and when there is no market to afford a surer test, the price at which the articles were bargained to a purchaser affords the best and indeed very satisfactory evidence of their value. * * * In Wood's Mayne on Damages, § 22, it is said: "But, if they [the goods] cannot be purchased for want of a market, they must be estimated in some other way. If there had been a contract to resell them, the price at which such contract was made will be evidence of their value." * * *

In the case of Culin v. Glass Works, 108 Pa. 220, it is said: "Upon the breach of a contract to furnish goods, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser by reason of the nondelivery." A distinction is drawn in some of the cases between a resale made at an advance subsequent to a contract of purchase and a resale made at an advance before the contract of purchase, which was known to the seller of the goods. Carpenter v. Bank, 119 Ill. 354, 10 N. E. 18. This is rather a fanciful distinction. It is not in accord with the ordinary usages of trade that a dealer, a man buying to sell again, should disclose his dealings with the same goods at a profit to his vendor. But, if there were any sound principle upon which this could rest, if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest, still, in this case, it is reasonable to suppose that a lumber getter selling 700,000 feet of lumber to a dealer in lumber should know (1) that it was for a resale, (2) that this resale was to be on a profit, and (3) that he should know that his vendee would be damaged to the amount of his profit, if the vendor should prove faithless. But the true basis of the general rule is that when there is a market, the vendee cannot be damaged, except in the difference between what the lumber did actually cost him and what he had purchased it at from the seller to him. But this rule can have, upon reason, no application whatever to a case where there is no market, (1) because the disappointed purchaser cannot buy in that market when there is no market to buy in, and (2) because the market price cannot be ascertained when there is no market.

Under the circumstances of this case, the commissioner ascertained the true and just amount of the damages. * * *[38]

[37] Part of the opinion is omitted, and the statement of facts is rewritten.

[38] See, also, McHose v. Fulmer, 73 Pa. 365 (1873); France v. Gaudet, L. R. 6 Q. B. 199 (1871); Loescher v. Deisterberg, 26 Ill. App. 520 (1888); Thol v. Henderson, 8 Q. B. Div. 457 (1881).

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McMAHON v. CITY OF DUBUQUE.

(Supreme Court of Iowa, 1898. 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143.)

Action for damages occasioned by a fire set out from sparks escaping from the smokestack of a steam road roller owned and being operated by the city of Dubuque in rolling newly laid macadam on one of its streets on which the lots of plaintiff abutted. The house thereon, with its contents, was destroyed. The jury returned a verdict for the plaintiff.

LADD, J.[39] The household goods and wearing apparel of the plaintiff and his family were destroyed. These had been used, were worn, and somewhat out of style. Such property has no recognized market value, and recovery must be based on its actual value. Gere v. Insurance Co., 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159; Clements v. Railway Co., 74 Iowa, 442, 38 N. W. 144. To ascertain the actual value, it was proper to take into consideration the original cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, and from all these determine what they were fairly worth. The cost alone would not be the correct criterion for the present value, but it would be difficult to estimate the value of such goods except by reference to the former price, in connection with wear, depreciation, change in style, and present condition. Luse v. Jones, 39 N. J. Law, 707; Railway Co. v. Nicholson, 61 Tex. 550. * * * The evidence was received, over the defendant's objection, showing the actual value of the house at the time of the fire, and, it is said, this does not furnish the true basis of recovery. The fundamental principle in all actions for damages is that just compensation be made to him who has suffered injury from another in his person or property, and, in order to give satisfaction, measured in money, such rules are formulated as are thought best adopted to accomplish this purpose. A distinction has, for this reason, been made between growing crops, shrubs, and trees, whose chief value is because of their connection with the soil and their incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined, apart from the ground on which they rest. It is thus put by Mr. Sutherland in his work on Damages (volume 3, p. 368): "If the thing destroyed, although it is a part of the realty, has a value which can be accurately measured and ascertained without reference to the soil on which it stands, or out of which it grows, the recovery may be the value of the thing thus destroyed, and not for the difference in value of the land before and after such destruction." In Drake v. Railway Co., 63 Iowa, 310, 19 N. W. 215, 50 Am. Rep. 746, crops were destroyed by overflow caused by an embankment, and the measure was held to be the difference

[39] Part of the opinion is omitted.

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between the market value of the land immediately before and after the injury. This rule was approved in Sullens v. Railway Co., 74 Iowa, 660, 38 N. W. 545, 7 Am. St. Rep. 501, and applied, where growing trees were burned, in Greenfield v. Railway Co., 83 Iowa, 276, 49 N. W. 95, and Brooks v. Railway Co., 73 Iowa, 182, 34 N. W. 805. See Smith v. Railroad Co., 38 Iowa, 518; Striegel v. Moore, 55 Iowa, 88, 7 N. W. 413. In Rowe v. Railway Co., 102 Iowa, 288, 71 N. W. 410, the court said: "Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage of the realty itself." It is apparent that the growing crops, small trees, and orchards are of little or no use separated from the soil, and that their value must necessarily be determined in connection with the land on which they stand. This is not true of improvements which may be replaced at will. In Graessle v. Carpenter, 70 Iowa, 167, 30 N. W. 392, the defendant, by digging trenches and laying water pipes, injured the plaintiff's fences, walks, house, and shrubs. It was not shown the acts were of such a nature as to permanently injure the real estate, or that it could not be restored to its condition before the fire. The court, through Beck, J., announced the rule to be that which will "give the plaintiff just and full compensation. * * * In the case before us the familiar and simple rule applicable to such cases would perfectly attain that end. That rule is this: The plaintiff may recover as damage the sum which, expended for the purpose, would put the property in as good condition as it was in before the injury, with the additional sums which would compensate the plaintiff for the use and enjoyment of the property, should he be deprived thereof by the injury, and the value of such property, as trees, buildings, and the like, which have been wholly destroyed, and cannot be restored to the condition they were in before the injury." We take it, the trees and shrubs were of a character which might be replaced by others of the same actual value; otherwise the case is not in harmony with those cited. In Freeland v. City of Muscatine, 9 Iowa, 465, the defendant, in changing the grade, dug away the dirt, and caused the plaintiff's house to fall, and it was held: "The cost of rebuilding or repairing was properly taken into consideration, if we understand it as having reference to the quality and condition of the building before the accident, and the instruction cannot be taken in any other sense. It is the cost of rebuilding and repairing, which implies the restoring it to as good a condition as before, and not the putting a new and firm building in the place of an old and decayed one." To prove the market value of the land immediately before and after the fire would be accomplishing, by circumlocution, what might be directly ascertained, for

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such difference would be the value of the house. True, location may sometimes have a bearing, as where a building is so situated as not to be useful for the purpose of its construction. In such cases this must be taken into consideration in fixing the real value. But it could be as readily done in estimating this separate from as with the land. Simplicity and directness are particularly favored in modern jurisprudence. True, such property may have no market value. It does, however, have actual value, and this is then the measure of recovery. The ruling was right. * * *

BATEMAN et ux. v. RYDER.

(Supreme Court of Tennessee, 1901. 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910.)

WILKES, J.[40] This is an action of trover brought by a mother against her daughter and her husband for the conversion of a guitar, four pictures, and a trunk containing clothing and manuscripts of prose and poetry composed by the plaintiff's former husband. The action was commenced before a justice of the peace, and the damages were laid at $500. There was a trial before the court and a jury, on appeal from the justice, when there were verdict and judgment for $200, and defendants have appealed to this court.

The first three assignments go to the measure of damages. Testimony was admitted to show a special value to plaintiff of the articles because they were gifts from her former husband, and because of the associations connected with them. It is said this was erroneous. It is said the court charged the jury that, in fixing the value of the property, they should consider the plaintiff's relations to the same. What the court did charge on this point was "that the jury must determine from all the evidence on that point what would be a fair and reasonable value for the property, considering plaintiff's relation to the same and the rights of property." The court, upon request, refused to charge that, the action being in trover for the conversion of property, the measure of damages was the actual value of the property. These assigments may all be treated together.

In actions of trover for the conversion of personal property, as a general rule the measure of damages is the market or actual value of the property at the date of the conversion. 26 Am. & Eng. Enc. Law, 818, and authorities there cited. But damages beyond the actual value of the property converted have been allowed the plaintiff when he has been subjected to some special loss or injury. Id. 849. "One criterion of damages is the actual value to him who owns it, and this is the rule when the property is chiefly or exclusively valuable to him; such articles, for instance, as family pictures, plate, and heir-

[40] Part of the opinion is omitted.

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looms. These should be valued with reasonable consideration of, and sympathy with, the feelings of the owner." 3 Suth. Dam. p. 476; Suydam v. Jenkins, 3 Sandf. (N. Y.) 620; Spicer v. Waters, 65 Barb. (N. Y.) 227. In Hale, Dam. p. 182, § 76, it is said: "When property has a peculiar value to the owner, such as it has to no other person, or when it cannot be exactly replaced by other goods of like kind, the actual value to the owner, and not the market value, is the measure of compensation."

The testimony shows that the four pictures were oil paintings bought in Italy by the plaintiff's husband at a cost of $500, and presented to her while traveling, and were valuable intrinsically as well as from association; that the original cost of the guitar was $50, and it was highly prized for its associations; that there was some considerable clothing in the trunk, besides a lot of manuscript productions, in prose and verse, of plaintiff's husband, which had never been published, and probably could not be reproduced. There is evidence, on the other hand, that the pictures were not well preserved; that their frames were dilapidated; that they would probably bring about $20 at auction, and that the guitar would perhaps sell for $5; that the clothing was worn and old, and of no real value; and that the manuscripts were of no value whatever. We think the court gave the proper instructions as to the feature of damages, and, while we would have been better satisfied with a smaller judgment, there is ample evidence to support the amount given. * * *[41]

JACKSONVILLE, T. & K. W. RY. CO. v. PENINSULAR LAND, TRANSP. & MFG. CO.

(Supreme Court of Florida, 1891. 27 Fla. 1, 9 South. 661, 17 L. R. A. 33.)

The declaration averred a negligent destruction of property in Tavares, Fla., to wit, a hotel, two stores, a livery stable, five cottages, and personal property, all to the value of $72,100, by reason of a fire caused by the escape of sparks from defendant's locomotives.

RANEY, C. J.[42] * * * Wherever there is a well-known or fixed market price for any property, the value of which is in controversy, it is proper, in establishing the value, to prove such market value; but, in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor—an ability, from such demand, to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing—no ability to sell the same—then it cannot be said to have a market value "at a time when, and at a place where," there is no market for the

[41] See Fairfax v. N. Y. C. & H. R. R., 73 N. Y. 167, 29 Am. Rep. 119 (1878), and Iler v. Baker, 82 Mich. 226, 46 N. W. 377 (1890).

[42] Part of the opinion is omitted, and the statement of facts is rewritten.

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same. We think it would have been a very harsh rule in a case like this to have confined the plaintiff to proof of the market value of the property at the time and place of its destruction, in the absence of proof that at the time and place of such destruction there was a market for such property. In cases where property is of a well-known kind in general use, having a recognized standard value, it is not proper to circumscribe the proof of such value within the limits of the market demand at the time when, and at the place where, it was destroyed. Were the rule contended for to prevail, then the compensation for personal properties, confessedly worth thousands of dollars, would be reduced to a pittance in cents if destroyed en route from market to market, in a thinly-settled, barren country where there was no demand, simply because of the accident of "time and place" of its destruction. In actions of this kind, where the value of the properties destroyed is the criterion of the amount of damage to be awarded, and the property destroyed has no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation; and to this end the original market cost of the property; the manner in which it has been used; its general condition and quality; the percentage of its depreciation since its purchase or erection, from use, damage, age, decay, or otherwise—are all elements of proof proper to be submitted to the jury to aid them in ascertaining its value. And to establish value in such cases the opinions of witnesses acquainted with the standard value of such properties are properly admissible. * * *

Judge Cooley, in Insurance Co. v. Horton, 28 Mich. 175, in speaking of evidence based on a knowledge of the purchase price of property, says: "The objection that the daughter of the plaintiff was allowed to testify to the value of articles burned, without having been shown to possess the proper knowledge to qualify her to speak as an expert, was not well taken. She testified that she bought a good many of the articles. * * *"

The amount which it would have cost to erect buildings of the same kind on the day of the fire, less a proper deduction for deterioration, is not the proper measure of damages in a case of this kind. * * *

The value of the property at the time and place of the fire is the question the jury is to pass upon. This the court charged, and the plaintiff admitted. Market value is what a thing will sell for. Railroad Co. v. Bunnell, 81 Pa. 414. To make a market, however, there must be buying and selling. Blydenburgh v. Welsh, 1 Baldw. 340. Property may have a value for which the owner may recover if it be destroyed, although it have no market value. Railroad Co. v. Stanford, 12 Kan. 354, 380, 15 Am. Rep. 362. "Suppose," asks the court

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in the case just cited, "a rod of railway track, or a shade tree, or a fresco painting on the walls or ceiling of a house, or a bushel of corn on the western plains, should be destroyed, could there be no recovery for these articles simply because there might be no actual market value for the same?" To fix the market value of a thing, it seems to us that there must be a selling of things of the same kind. If there had ever been a sale of an hotel, or of any other building, in Tavares, we are not informed; and we have no judicial knowledge, nor does the record inform us, that hotels have a market value there. Yet, though there is no market value or standard value, the plaintiff should not be allowed more than the property destroyed by fire on the 9th of April, 1888, was reasonably worth in Tavares. To do this it is proper to invoke the aid of all facts calculated to show its value, and we are unable to perceive that the circuit judge erred in admitting the evidence of the cost of replacing the building on the day of the fire. It was a fact tending to show, and to be considered with others, by the jury in determining what amount of money would put the plaintiff in the position in which he was at the time. * * *

Recourse may be had to the items of cost, and its utility and use. 2 Suth. Dam. 378. In Luse v. Jones, 39 N. J. Law, 707, the plaintiff was permitted to show the cost of a bedstead as tending to prove its value. This cost was the price at which a regular dealer in such articles had sold it when new in the ordinary course of trade. "A sale so made," said the court, "was evidence of the market value of the thing when new, and the value of such goods when worn can scarcely be ascertained except by reference to the former price, and the extent of the depreciation. Of course, the cost alone would not be a just criterion of the present value, but it would constitute one element in such a criterion, and the attention of the jury in this case was clearly directed to the importance which it deserved to have." See, also, Sullivan v. Lear, 23 Fla. 463, 474, 2 South. 846, 11 Am. St. Rep. 388. In Whipple v. Walpole, 10 N. H. 130, it was held it was admissible to prove what horses like those lost or injured cost at a town near the place where the loss occurred. Upon the same principle, and for even stronger reasons, we think that the cost of restitution at the time of the destruction of the building was an element which might be considered by the jury with others in ascertaining value. * * *

Upon the question of the allowance of interest as matter of right upon the amount of damages found by the jury, from the date of the destruction of the property in cases like this where the damages sued for are unliquidated, the following authorities, with others that we have examined, hold, in effect, "that the jury may, at their discretion, allow and include interest in their verdict as damages, but not as interest eo nomine:" 2 Sedg. Meas. Dam. p. 190; authorities cited in note to Shelleck v. French, 6 Am. Dec. 196; Black v. Transportation Co., 45 Barb. (N. Y.) 40; Railroad Co. v. Sears, 66 Ga. 499; Lincoln v. Claflin, 7 Wall. 132, 19 L. Ed. 106; Garrett v. Railway Co., 36 Iowa,

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121; Brady v. Wilcoxson, 44 Cal. 239. In all these authorities no other reason is given for this rule than that it has been so held in other cases that have gone before them, except that in a few cases it is put upon the ground that where property is wrongfully taken and withheld, the defendant gets the benefit of its use during the detention, and is required to pay interest as compensation for such use, when in cases of property wrongfully destroyed the defendant derives no benefit therefrom. The answer to this theory is that, in cases of this kind for the negligent and wrongful destruction of property, the issue as to the amount of the compensation does not depend upon benefits that accrued therefrom to the defendant, whose negligent act brought about the destruction; but the issue rests wholly upon the question as to what is the sum of the damage to the party whose property has been destroyed. Neither do we think this theory can properly be applied even in cases of trespass and trover. Interest on the value of the property taken in those cases cannot correctly be said to be allowed to the plaintiff "because the defendant derives benefit from the use of the property," but is allowed to the plaintiff to compensate him for his deprivation of its use during the detention thereof. * * *[43]

McGREGOR et al. v. KILGORE.

(Supreme Court of Ohio, 1834. 6 Ohio, 359, 27 Am. Dec. 260.)

The action was case upon a bill of lading, dated July 5, 1832, for certain parcels of merchandise consigned to the plaintiffs, shipped on board the steamboat Chesapeake, to be delivered at Cincinnati in good order (the danger of the river alone excepted); "but in case of the water not admitting the boat to proceed to Louisville, the owners of the goods to pay the expense of reshipping to that place from the point where they are reshipped, and the captain agrees they shall be forwarded without any delay." Breach, that through the carelessness and negligence of the defendant, the goods were lost.

Plea, not guilty; notice that the low water would not permit the boat to go up to Louisville, and, therefore, the goods were landed at Trinity, near the mouth of the Ohio, and were injured after they were so landed. The jury found that the goods were landed at Trinity, at the mouth of the Ohio, and left in charge of the defendant—the boat having returned to New Orleans—were placed under a temporary shed erected for the purpose, near the river, and several days afterward, while the boat hands were attempting to remove them to another place of deposit adjoining, the cask, being large and heavy, slipped away from the workmen, and rolled into the Ohio river, and damaged the goods by the wetting.

[43] As to method of computing value of converted negotiable instruments, see Griggs v. Day, 136 N. Y. 152, 32 N. E. 612, 18 L. R. A. 120, 32 Am. St. Rep. 704 (1892).

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WRIGHT, J.[44] * * * The goods were delivered at Cincinnati in an injured condition. The carrier earned full freight for their transportation. It would seem to be the dictate of natural justice that the person liable for their safe delivery should make good to the owner the injury they sustained while under his care and control. The owner was entitled to the goods at Cincinnati in their perfect state. But for the act of the defendant he would have had them in that condition. The carrier, in case he deliver the goods at the port of delivery, earns, and is entitled to demand full freights, notwithstanding they have been partially injured, and the consignee must look to his bill of lading for indemnity. In New York the rule is established that the measure of damage is the value of the goods at the port of delivery. Amory v. McGregor, 15 Johns. 38, 8 Am. Dec. 205; Bracket v. McNair, 14 Johns. 171, 7 Am. Dec. 447. The Supreme Court of Pennsylvania, upon full examination, held it best to remove from the carrier all temptations to fraud, and that was best done by making him liable for the value of goods lost at the place of delivery, and established that as the rule of damages in such cases, founded upon authority, general convenience, and good policy. Gillingham v. Dempsey, 12 Serg. & R. 186. These authorities are not shaken by those cited by the defendant. We think this is obviously the rule of law and justice. The jury have returned two valuations looking to this point:

(1) The value, adding sixty per cent. to the sterling cost, as the usual mercantile estimate in Cincinnati, to cover the charges, freight, and insurance from Liverpool.

(2) The actual value of the goods in Cincinnati, deducting therefrom the proceeds of the goods, sold in their injured condition.

Which of these furnishes the rule of damages is the question? The first is the usual mode of ascertaining the net cost of such goods in Cincinnati. In the absence of other evidence, that would be taken as the value of the goods. But when the actual value is found, the supposed or presumed value yields. That is the case here, the jury have assessed the damages, as predicated on the actual, as well as the supposed value, the actual value measures the real injury, and is the rule of damage. * * *[45]

[44] Part of the opinion is omitted.

[45] That the measure of damages against a carrier for failure to deliver goods is the value thereof at the place of delivery at the time delivery should have been made, see, further, C. & N. W. Ry. Co. v. Dickinson, 74 Ill. 249 (1874); Spring v. Haskell, 4 Allen (Mass.) 112 (1862); Watkinson v. Laughton, 8 Johns. (N. Y.) 213 (1811), post, p. 609; Brandt v. Bowlby, 2 Barn & Adol. 932 (1831); Smith v. Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639 (1842), ante, p. 334.

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MONTANA RY. CO. v. WARREN.

(Supreme Court of Montana, 1887. 6 Mont. 275, 12 Pac. 641.)

BACH, J.[46] This action was commenced by a petition, upon which commissioners were appointed to assess the value of certain lands lying in Silver Bow county, and belonging to the respondents, over which lands the appellant sought to obtain an easement for the purpose of constructing a railroad. The land mentioned in the petition was a mining claim, known as the "Nipper Lode"—a claim undeveloped, but upon which there were several shafts, one 41 feet deep, another 20 feet deep. In fact, the property was of that description generally known as a "prospect." * * *

Does the fact that the Nipper lode had produced no return justify the legal conclusion that that property has no legal value, as is claimed by appellant to be the rule of law? A vacant lot in a large city "produces no return." Any return therefrom in the future must be a matter of speculation—a speculation depending, among other things, upon the nature and size of the house which is still to be built, and the rent that can be obtained from a lease thereof, if it ever can be leased. If we should apply, in such a case, the rule invoked by appellant, there would be no value assignable to a property which, as a matter of fact, may be immensely valuable. What, then, is the value of such a lot? It is its market value—the price which it would bring in a fair market—which price may be established by competent witnesses, who know the character and situation and usefulness of that property.

Under certain circumstances a stream of water flowing through land makes that land valuable, because of the power to be derived therefrom, or because of the possibility of irrigation, as in this country. There may be no mill. There may have been no attempt to use that water for the purposes of irrigation. Still those are qualities or characteristics which may, under certain circumstances, enhance the present market value of that property, with a mill, or when irrigated and cultivated. That would be speculation. The question is, what effect have these circumstances upon the opinion of the community? How do they affect the market value? A man may have property well situated to a certain purpose—such as a mill site, or as a farm, or as a residence or store, or as a mine—and he may refuse to use it for any one of those purposes to which it is best suited. Still he may sell it in open market to a purchaser whose opinion of its present market value is based upon the future use to which it may be put. Still he may claim, in any proceeding to condemn that land, the market value thereof, as that value is fixed by the public for those purposes.

The difference between such a valuation and speculation seems clear. Land never used by its owner for any purpose is sought to be con-

[46] Part of the opinion is omitted.

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demned. The fertility of the soil is one of the characteristics or properties of that land. It has never produced any returns; but there is no attempt to prove future productions. They are speculative. The fertility of the soil is a fact—a fact which in some cases may add great value to the property, and may be one of the constituents of the market price. See Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206. The court says (98 U. S. 407, 25 L. Ed. 208): "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Its capability of being made thus available gives it a market value which can be readily estimated." And the court cites with approval Young v. Harrison, 17 Ga. 30, in which case the value of farming land at a bridge site was allowed to be proved.

In Boom Co. v. Patterson, just above cited, the value of land on account of its availability for building a boom across a river was allowed to be proved. In the one case there was no bridge; in the other there was no boom. The value of those lands, if a bridge or boom was built, was a matter of speculation; but the present market value of those lands was more or less dependent upon the fact that they might be put to such uses. That was fact. See, also, the other authorities in case of Boom Co. v. Patterson.

So with a "prospect." It certainly has value in the market. What is the characteristic of the prospect? If ore has been found, that fact is an element of value. It is the "fertility" of that piece of property. The value will increase as the prospect becomes more developed; but, as soon as a vein of ore is found in land in a mining district, it places a market value upon that land, greater or less, owing, as in all cases, to circumstances. That fact is as certain an element of price as is the fertility of the soil, the situation, chances for a mill-site, or, in case of a well-developed mine, the possibility of future production of ore. In what respect does a prospect differ from a mine, except the fact that ore has been taken from the latter in large quantities? Can it be said of a mine that it will continue to produce valuable ores with any greater certainty than it can be said of a well-developed prospect that it will produce valuable ores? Future profits are a matter of uncertainty in the one case as well as in the other. In fact, the only distinction is that the mine is poorer than it was as a prospect because of the extraction of valuable ore once contained therein. Land adjacent to a well-known mine has a market value greater or less, depending whether it lies on or off the vein. In one case its present value depends

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upon its mineral character; in the other case, upon its adaptability for a dump, or for building purposes. As has been already said, a prospect is more a matter of speculation than is a mine from which ore has been taken. The future of each is equally uncertain. The value of each is to be ascertained in the same way, viz., under all the circumstances, what is the market value? * * *[47]

(B) Fluctuations in Value.

SHEPHERD v. JOHNSON.

(Court of King's Bench, 1802. 2 East, 211.)

This was a writ of inquiry to assess damages on a bond given by the defendant, conditioned that his co-obligor should replace a certain quantity of stock which the testator had lent him, and which was to be replaced on the 1st of August, 1799. At the trial before Le Blanc, J., at the sittings in term at Westminster, the only question was, Whether the damages should be calculated at £1133. 18s. 6d. the price of the stock on the 1st of August when it was to be replaced; or at £1224. 1s. the price of the stock on the day of the trial; the value of the stock having risen so much in the mean time? The learned judge being of opinion, that as the agreement had been broken, and the stock never replaced, the plaintiff was entitled to recover the larger sum, being that which could alone indemnify him at the present time. And the verdict was taken accordingly for £1224. 1s., with leave for the defendant to move the court to reduce the damages to £1133. 18s. 6d. if they were of opinion that the plaintiff was not entitled to recover more.

Littledale now moved for a rule to that effect; and referred to Dutch v. Warren, 2 Burr. 1010, 1 Stra. 406, and Sanders v. Hawksley, 8 Term Rep. 162, where the damages had been estimated by the price of the stock at the time when it ought to have been replaced; though he admitted, that in the latter case the stock had fallen in value before the trial. He also mentioned a case of Isherwood v. Seddon, sittings after Michaelmas term, 1800, before Lord Kenyon, where in an action on a bond conditioned to replace stock on a certain day, the price of the day was taken as the criterion of the damages, because it was the plaintiff's own fault if he delayed bringing his action upon the default of the defendant, so as to lose the benefit of the subsequent rise of the stock. And he urged the last mentioned reason as an argument against taking the price of the stock at the day of the trial in case

[47] That the value of property is to be estimated with reference to its peculiar availability for specific purposes, see, also, Horton v. Cooley, 135 Mass. 589 (1883); Reed v. O. & M. R. R. Co., 126 Ill. 48, 17 N. E. 807 (1888); Moore v. Hall, 3 Q. B. Div. 178 (1878).

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it had risen in the mean time; for then, after a default once made, it would be in the plaintiff's power, either by hastening or delaying his suit, to take advantage of the rise in the market, without any risk in case the market fell.

GROSE, J. The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say, that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards so as to avail himself of a rising market.

LAWRENCE, J. Suppose a bill were filed in equity for a specific performance of an agreement to replace stock on a given day, which had not been done at the time; would not a court of equity compel the party or replace it at the then price of the stock, if the market had risen in the mean time?

LE BLANC, J., of the same opinion.

Rule refused.[48]

CLARK v. PINNEY.

(Supreme Court of New York, 1827. 7 Cow. 681.)

The action in the court below was assumpsit, brought in May, 1821, by Pinney against Clark and Clark, on the following note: "We promise, for value received, to pay John Pinney, one hundred and fifty dollars, in good first quality common salt, at one dollar and fifty cents per barrel, salt to be subject to duties; said salt to be delivered at Salina, in good boating order, on the fifteenth of April next. The 9th of August, 1820. James Clark. William Clark." * * *

After giving the note in evidence, the plaintiff below offered to prove the value of salt per barrel at Salina in the fall of 1822, claiming that he was entitled to recover the highest price which salt bore between the time when the salt became due, and the day of trial. This was objected to by the defendants below; but the evidence was received; and the defendants below excepted. * * *[49]

SUTHERLAND, J.[50] * * * In the ordinary case of a contract for the sale or delivery of a personal chattel, where the price is not paid at the time of making the contract, but is to be paid upon the delivery of the article, the criterion by which to measure damages for the breach of the contract, is unquestionably the price of the article at

[48] But see Gordon v. Pym, 3 Hare, 223 (1843).

[49] Part of the official statement of the case is omitted.

[50] Part of the opinion is omitted.

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the time it was to be delivered. Shepherd v. Hampton, 3 Wheat. 200, 4 L. Ed. 369; Douglass v. McAllister, 3 Cranch, 298, 2 L. Ed. 445; Pitcher v. Livingston, 4 Johns. 15, 4 Am. Dec. 229, per Spencer, J.; Leigh v. Patterson, 8 Taunt. 540; Gainsford v. Carroll, 2 B. & C. 624. We are not aware that this principle has ever been contested. It certainly was not our intention to question it, in the judgment pronounced in West v. Wentworth & Beach, 3 Cow. 82.

But we hold it to be equally clear, that if the price be paid at the time of making the contract, or at any time anterior to that fixed for the delivery, and the vendor fails to deliver, the vendee is not confined in measuring his damages, to the value of the article on the day when it should have been delivered.

Most of the cases in which this principle has been adopted, have grown out of contracts for the delivery and replacing of stock; and it is believed there is no case to be found in England in which the damages upon such a contract, have been confined to the value of the stock at the time when it should have been replaced, where the action was brought upon the contract itself, and the question was distinctly presented and passed upon by the court, it appearing affirmatively that the stock was subsequently of greater value. * * *

This distinction is expressly recognized and sanctioned by Chief Justice Marshall, in Shepherd v. Hampton, 3 Wheat. 200, 4 L. Ed. 369. That was an action brought for the breach of a contract for the sale and delivery of 100,000 pounds of cotton, to be delivered on or before the 15th day of February, 1815, for which the plaintiff was to pay at the rate of 10 cents per pound. The defendant delivered about 50,000 pounds by the time stipulated; and then refused to fulfill his contract, or deliver any more. Cotton rose between the 15th of February, 1815, and the commencement of the suit, from 12 to 30 cents; and the plaintiff contended that he was entitled by way of damages to the difference between the price stipulated, and the highest market price up to the rendition of the judgment. The court, however, held the rule of damages to be the market price of cotton on the day the contract ought to have been executed. The Chief Justice says: "The unanimous opinion of the court is, that the price of the article at the time it was to be delivered, is the measure of damages. For myself only," he continues, "I can say, that I should not think the rule would apply to a case where advances of money had been made by the purchaser under the contract. But I am not aware what would be the opinion of the court in such a case." * * *

Kent, J., in delivering the opinion of the court in Cortelyou v. Lansing, 2 Caines' Cas. 216, cites, apparently with approbation, the case of Shepherd v. Hampton; and he cites it in confirmation or illustration of the principle which he was then maintaining, that in many cases, the measure of damages is not the value of the chattel or article, at the time when the cause of action accrued. In that case,

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the depreciation note which had been pawned to Cortelyou, was sold by him in 1788. It was not demanded by the representatives of the pawnor until 1799, eleven years afterwards; and there was no evidence of a readiness or capacity on the part of the plaintiff, when he made the demand, to redeem the pledge. The cause of action, therefore, did not arise from the demand; but accrued substantially at the time of the sale; by which act the defendant incapacitated himself to restore the pledge. But the plaintiff in that case, recovered according to the value of the note in 1799, when it was demanded; because, as the court express it, he manifested his will to have it then restored. The rule in trover, that, where the chattel is not of a fixed and determinate value, the damages are not in all cases confined to its worth at the time of conversion, but may be enhanced according to its increased value subsequent to that time, as established in Fisher v. Prince, 3 Burr. 1363, and Whitten v. Fuller, 2 Bl. Rep. 902, was also adverted to for the same purpose.

The adopting of a period, then, subsequent to that when the cause of action accrued, as the time when damages are to be measured, where the circumstances of the case show that the substantial purposes of justice will be best promoted by it, is not an anomaly in the law; nor is it peculiar to contracts for the sale or delivery of stock. * * *

We hold it, therefore, to be settled by authority, and rightly settled upon principle, that where a contract is made for the sale and delivery of goods or chattels, and the price or consideration is paid in advance, and an action is brought upon the contract, for the nondelivery, the plaintiff is not confined, in measuring his damages, to the value of the articles on the day when they should have been delivered. But we doubt the propriety of giving the vendee in all cases, as a measure of damages, the highest price of the article, between the day when it should have been delivered and the day of trial. If he immediately, or without any unreasonable delay, commences and prosecutes his action, we think it just and proper that the fluctuation in price should be exclusively at the hazard of the defendant; the plaintiff having done everything in his power to have the contract settled and adjusted, and which is prevented solely by the laches or default of the defendant. In such a case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made, and the day of trial. But where he delays the prosecution of his claim, beyond the period which may be considered reasonable, for the purpose of endeavoring to make an amicable arrangement, he must be considered as assenting to the delay, and ought to participate in the hazard of it. In such a case, we are inclined to think the rule of damages should be the value of the article at the commencement of the suit.

Whether this rule of damages would be applicable to contracts for the sale and delivery of individual articles, purchased for the use and accommodation of the vendee, and not for the purpose of sale, we ex-

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press no opinion. The case at bar is evidently a contract for the purpose of trade and commerce; and to that class of cases, we wish to be understood, as at present confining our opinion. * * *[51]

SCOTT v. ROGERS.

(Court of Appeals of New York, 1864. 31 N. Y. 676.)

On July 12, 1853, the defendants, having in store 5,558 bushels of plaintiff's wheat at Buffalo, were directed by telegraph to sell the same on that day for $1.08 per bushel, or, if they did not sell it on that day, to ship it to New York. The defendants sold the wheat on the day following at 8:00 a. m. for $1.08. Had the wheat been shipped as directed it would have reached New York between July 27th and 31st. The highest price to August 4th was $1.31. The price flucuated in the New York market between July 25th and November 29th between $1.25 and $1.65. The court decided that the sale on the 13th was a conversion, and that the measure of damages was the difference between the price the wheat was sold for and what it was worth in a reasonable time after the sale within which the action might be begun (which was fixed at November 29th), after deducting the cost of transportation and storage, or 20¼ cents per bushel. Judgment for plaintiff for $2,764.44, from which defendant appeals. Affirmed.

HOGEBOOM, J.[52] * * * I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to wit: To allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; and as between these two periods—the time of commencing the suit and the time of trial—the rule is somewhat fluctuating. What this reasonable time shall be, has never been definitely settled, and may, perhaps, fluctuate to some extent according to the circumstances of the particular case. In the case at bar, it was held to be four months after the conversion, which terminated before the close of navigation in that year; which latter circumstance might perhaps be supposed to have some probable influence in raising the market price of the property in New York, and

[51] See, also, for allowing the highest value up to the time of the trial, when the goods were paid for in advance and not delivered, Elliot v. Hughes, 3 Fost. & F. 387 (1863). And cf. Startup v. Cortazzi, 2 Cromp., M. & R. 165 (1835), and Valpy v. Oakeley, 16 Q. B. 941 (1851).

So, in an action for not redelivering on the appointed day shares of stock loaned to defendant. McArthur v. Lord Seaforth, 2 Taunt. 257 (1810); Downes v. Back, 1 Starkie, 318 (1816); Harrison v. Harrison, 1 Car. & P. 412 (1824); Owen v. Routh, 14 C. B. 327 (1854).

[52] Part of the opinion is omitted.

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therefore as not unlikely to induce the plaintiff to retain the property until that time. * * *

It has been held in cases where damages are sought for the breach of a contract for the sale of personal property, wholly executory on both sides, that the true rule of damages is the difference between the purchase price named in the contract and the price of the property at the time fixed for performance; that, as nothing had been paid upon the property, if the plaintiff still wished to obtain the property, he could go into the market and procure it with the sum named in the contract, with the addition of its rise in value, or, if he chose simply to pocket the damages, he could do so by receiving a sum equal to the difference in value between the two periods, and thus obtain complete indemnity.

But, that where the executory contract had been performed on the part of the plaintiff by the payment of the price, and was broken by the defendant by the nondelivery of the property, the true rule of damages was to allow to the plaintiff the highest market price intervening between the time of conversion and the time of the commencement of the action or of the trial when the action was commenced within a reasonable time after the conversion, upon the principle that it might be inconvenient or impossible and was unjust to require the plaintiff, in order to procure a similar article to that illegally converted, to pay the contract price a second time, with the added value prevailing at the period of performance; and that it was more equitable to hold the defendant responsible for the fluctuations of the market, so long as he continued to deprive the plaintiff of the article purchased, up to the period when, by operation of law and the effect of a verdict, the title was transferred from the plaintiff to the defendant. * * *

BAKER v. DRAKE et al.

(Court of Appeals of New York, 1873. 53 N. Y. 211, 13 Am. Rep. 507.)

The plaintiff deposited from time to time with the defendant sums aggregating $1,240 for the purchase of shares of stock of the Chicago & Alton Railroad, which defendant as broker purchased on account for the plaintiff at the total cost of $66,300 above all sums advanced by the plaintiff. On November 14, 1868, the defendant wrongfully sold the stock, which was then of the market price of less than $67,000, the surplus belonging to plaintiff being thus but $558. The stock subsequently rose rapidly in value, on November 24th, the date of the beginning of this action, being worth $5,500 more; i. e. selling at 145. The maxium point was reached in August, 1869, when 30 shares sold for 170. On the day preceding the trial, October 20, 1869, the price was 143, and during the month preceding it ranged between 137 and 145. The jury, under the rule announced by the court, allowed a recovery for $18,000, which was the difference between 170 and 134; the latter being the average price at which the defendant sold.

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RAPALLO, J.[58] * * * The judge at the trial, following the case of Markham v. Jaudon, 41 N. Y. 235, instructed the jury that the plaintiff, if entitled to recover, was entitled to the difference between the amount for which the stock was sold by the defendants and the highest market value which it reached at any time after such sale down to the day of trial.

This rule of damages has been recognized and adopted in several late adjudications in this state in actions for the conversion of property of fluctuating value; but its soundness, as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other states.

This court has, in several instances, intimated a willingness to reexamine the subject, and in Matthews v. Coe, 49 N. Y. 57, per Church, C. J., stated very distinctly that an unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, could not be upheld upon any sound principle of reason or justice, and that we did not regard the rule referred to so firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary.

Whether the present action is one for the conversion of property of the plaintiff, or for the breach of a special contract, presents a serious question, but that inquiry is perhaps unimportant on the question of damages and will be deferred for the present, and the case treated as if it were one of conversion. * * *

This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in further loss as in profit, to lay down as an inflexible rule of law that as damages for its wrongful interruption the largest amount of profit which subsequent developments disclose might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to

[58] Part of the opinion is omitted, and the statement of facts is rewritten.

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me a wide departure from the elementary principles upon which damages have hitherto been awarded.

An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable. * * *

The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation, except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss.

If upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done.

But the rule adopted in Markham v. Jaudon, passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him, with his venture out, for an indefinite period, limited only by what may be deemed a

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reasonable time to bring a suit and conduct it to its end. The more crowded the calendar and the more new trials granted in the action, the better for him. He is free from the trouble of keeping his margins good and relieved of all apprehensions of being sold out for want of margin. If the stock should fall or become worthless he can incur no loss, but, if at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss. * * *

The most thorough consideration of the subject to be found in any reported case is contained in the extremely able opinion of Duer, J., in Suydam v. Jenkins, 3 Sandf. 619 to 647, where that accomplished jurist reviews, with great discrimination, many of the cases here referred to, and others which have not been cited, and arrives substantially at the same conclusion as that reached by Church, C. J., in Matthews v. Coe, 49 N. Y. 57, that the highest price which the property has borne at any time between its conversion and the trial cannot in all cases be the just measure of damages. The reasoning contained in that opinion is of such force as to outweigh the apparent preponderance of authority in favor of the rule claimed, and demonstrates its fallacy when applied to the facts of the present case, whether the cause of action be deemed for conversion of property or the breach of a contract. * * * Reversed.

WRIGHT v. BANK OF THE METROPOLIS.

(Court of Appeals of New York, 1888. 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.)

Stock had been deposited with the defendant as collateral, and had been wrongfully sold by it on January 29, 1878, for $2,261.50. This sale was not known to the owner until May 9th. The action was commenced October 7, 1879. On February 14, 1881, the stock reached the highest price down to the date of the trial, selling on the market that day for $18,003. The jury found a verdict for $3,391.25. There was no evidence showing when the stock reached that value. Both parties appealed.

PECKHAM, J.[54] * * * By the charge the case was left to the jury to give the highest price the stock could have been sold for, intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule

[54] Part of the opinion is omitted, and the statement of facts is rewritten.

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is claimed under Romaine v. Van Allen, 26 N. Y. 309, and several other cases of a somewhat similar nature, referred to therein. Markham v. Jaudon, 41 N. Y. 235, followed the rule laid down in Romaine v. Van Allen. In these two cases a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the Markham Case the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of Romaine. In this state of the rule the case of Matthews v. Coe, 49 N. Y. 57–62, came before the court. The precise question was not therein involved; but the court, per Church, C. J., took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances; and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, where the plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in Markham v. Jaudon, supra, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of this judgment. * * *

In stating what in his view would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment; and he added that, if they had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done. The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or in other words, in repurchasing the stock.

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We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the 9th of May of the same year. The highest price which the stock reached during that period was $2,795, and, as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time. * * *[55]

DIMOCK et al. v. UNITED STATES BANK.

(Court of Errors and Appeals of New Jersey, 1893. 55 N. J. Law, 296, 25 Atl. 926, 39 Am. St. Rep. 643.)

The plaintiff bank sued, May 21, 1891, to recover a balance claimed of $4,456.25 upon a loan to defendant of $50,000 on a note maturing in August, 1884. The defendant set up a wrongful conversion of certain stock deposited as collateral to the loan, in that the plaintiff sold the same May 15, 1884, prior to the maturity of the note. The sale netted $45,456.26. In December, 1886, and in April and May, 1887, the securities were worth in the market $56,860. The court below refused to allow defendant's claim and rendered judgment for the balance due.

DEPUE, J.[56] * * * Assuming that the sale of the securities in May was unauthorized, it was a conversion of the property, though the sale was made in good faith. Nevertheless, the judge's finding, and the rule of damages applied, were correct. The general rule is that the measure of damages for conversion is the value of the property at the time of the conversion. This rule has been modified with respect to the conversion of stocks and bonds, commercial securities vendible in the market, the market value of which is liable to frequent and great fluctuations, caused by the depression and inflation of prices in the market. Markham v. Jaudon, 41 N. Y. 235; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368. These decisions were made in cases where the transactions were dealings between the customer and broker in the purchase and sale of stocks on a margin. Subsequently the same rule was applied where the owner of stock for which he had paid full value, and which he held as an investment, put it in the hands of a broker as collateral security for the debt of a third person, upon condition that it should not be sold for six months, the stock having been sold without the owner's authority

[55] The course of the New York decisions in the highest court of New York to the principal case is completed by the addition of the following cases: Suydam v. Jenkins, 3 Sandf. 614 (1850); Romaine v. Van Allen, 26 N. Y. 309 (1863); Burt v. Dutcher, 34 N. Y. 493 (1866); Markham v. Jaudon, 41 N. Y. 236 (1869); Matthews v. Coe, 49 N. Y. 57 (1872); Lobdell v. Stowell, 51 N. Y. 70 (1872); Gruman v. Smith, 81 N. Y. 25 (1880); Colt v. Owens, 90 N. Y. 368 (1882).

[56] Part of the opinion is omitted, and the statement of facts is rewritten.

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before the expiration of that time. Under the decisions of the New York courts, reasonable time, where the facts are undisputed, is a question of law for the court. Wright v. Bank, 110 N. Y. 238, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356. In Colt v. Owens, 90 N. Y. 368, 30 days after the sale and notice of it was regarded as reasonable time.

The rule of the highest intermediate value between the time of the conversion and the time of the trial has been rejected in the Supreme Court of the United States as the proper measure of damages, and the rule that the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it was adopted as the correct view of the law; for the reason, as expressed by Mr. Justice Bradley, that more transactions of this kind arise in the state of New York than in all other parts of the country, and that the New York rule, as finally settled by its Court of Appeals has the most reason in its favor. Galigher v. Jones, 129 U. S. 194, 9 Sup. Ct. 335, 32 L. Ed. 658. The principle upon which this doctrine rests is the consideration that the general rule that in an action for a conversion the market value of the property at the time of the conversion would afford an inadequate remedy, or rather no remedy at all, for the real injury, which consisted in the wrongful sale of property of a fluctuating value at an unfavorable time, chosen by the broker himself; hence the cost of replacing the securities by a purchase in the market, allowing a reasonable time for that purpose, has been regarded as the proper measure of damages. As was said by Mr. Justice Bradley in Galigher v. Jones: "A reasonable time after the wrongful act complained of is to be allowed to the party injured to place himself in the position he would have been in had not his rights been invaded."

The general rule that the market value at the time of the conversion is the measure of damages being found to be impracticable in these cases, and having been abandoned, the effort has been to obtain some rule by which substantial justice, as near as may be, may be attained. In England the market value at the time of the trial appears to be the measure of damages. Owen v. Routh, 14 C. B. 327. In some of the sister states the rule of the highest intermediate price before the trial has been adopted. In New York, and in most of the sister states, as well as in the Supreme Court of the United States, the formula which has been called the "New York Rule" has been adopted, and is the rule which will accomplish the most complete justice in the ordinary transactions between the broker and his customer dealing in stocks when an unauthorized sale is the act of conversion. In such cases the customer has a choice of remedies. He may claim the benefit of the sale, and take the proceeds; he may require the broker to replace the stock, or replace it himself, and charge the broker for the loss; or he may recover the advance in the market price up to a reasonable time within

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which to replace it after notice of the sale. Cook, Stock & S. 460. But where stocks and negotiable securities are pledged as collateral security for the payment of a debt to become due and payable on a future day, another element enters into the consideration of the compensation to be awarded to the owner of the securities for the unauthorized sale of them before the debt matures. Upon such a bailment it is the duty of the pledgee to keep the securities in hand at all times ready to be delivered to the pledgor on the payment of the debt. Cook, Stock & S. 469–471.

An unauthorized sale before the debt matures is a conversion, for which the pledgor may have remedy in the manner above mentioned. But the sale may be made when the market value is depreciated, and the market with a downward tendency. The market may revive, and prices be enhanced before the debt matures. Under such circumstances, a rule that the pledgor shall be at liberty to elect to treat the unauthorized sale as a conversion, or to hold the pledgee for the breach of his duty to keep the securities until the maturity of the debt, and recover as damages the market value of the securities as of that time, would commend itself in reason and justice. As applied to the facts of this case, this rule would be eminently just. The plaintiff in good faith sold the securities in the manner authorized by the contract of pledge. The breach of duty was in selling at an unauthorized time. The debt was not paid or tendered at maturity; and if the plaintiff had held the stock, and sold it at that time, the sale would have been strictly in conformity with the power. If the defendants lost anything by the sale at a time unauthorized, they would be recompensed for that loss by an award of damages equivalent to the market value of the securities at the time the debt became due. Tested by either of these standards, the proper credit was allowed, the proof being that the prices of the securities were less when the note matured than when the securities were sold. No evidence of an increased price prior to December, 1886, was produced. * * *

PINKERTON v. MANCHESTER & L. RAILROAD.

(Supreme Judicial Court of New Hampshire, 1861. 42 N. H. 424.)

BELLOWS, J.[57] * * * This is an action of assumpsit, for refusing, on demand, to give to the plaintiff a certificate of twenty-nine shares of the stock of Manchester & Lawrence Railroad, and to pay him the dividends on the same stock. * * *

There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock. The general rule is, undoubtedly, that he shall have the

[57] Part of the opinion is omitted.

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value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that, in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that, in a large number of cases, and, perhaps, generally, it would not be so. In that large class of cases where the articles to be delivered entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dye stuffs, etc., to hold that the plaintiff might elect, as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For, in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial, or otherwise. Shall there be a different measure of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before the trial, which might often be several years, would be giving him not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain.

In view of such results, the courts in England and New York have been inclined to shrink from the application of that rule, in many cases; and it has been held that it would not be applied where the action was not brought in a reasonable time; and this, undoubtedly, because of the injustice of allowing the plaintiff to take advantage of the fluctuations of many years. But even if brought in a reasonable time, and what is a reasonable time is not easy to say, there might be often a lapse of many years before a final trial. In actions of trover, trespass and replevin, there would be stronger reasons for the application of such a distinction than in cases of contract; inasmuch as the plaintiff is not only deprived of the use of his property, and the means to replace it from the avails, but is so deprived by the tort of the defendant. If, then, the rule is just, it should be applied in these actions, the form of the action not being material in this respect; and

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in jurisdictions where this doctrine is recognized it has been so applied, as in Wilson v. Mathews, 24 Barb. (N. Y.) 295, and Gunning v. Wilkinson, 1 C. & P. 625, which was trover for East Indian warrants for cotton. In Wilson v. Mathews, the highest market price between the breach and the day of trial was held to be the rule.

In this state no such rule has been adopted, and it requires no citation of authorities to show that, as applied to actions of trespass, trover or replevin, it would find no countenance here.

The same reasons which oppose the right of electing the value at any intermediate day, as the rule of damages, apply also to an election between the time of the breach and the time of the trial; and we are disposed to hold the value at the time of the breach, or when the articles ought to have been delivered, as the just and convenient rule. * * *

INGRAM v. RANKIN et al.

(Supreme Court of Wisconsin, 1879. 47 Wis. 406, 2 N. W. 755.)

TAYLOR, J.[58] This is an action to recover for the value of a quantity of hay, wheat and oats, which the plaintiff claims to own, and which he alleges was wrongfully and unlawfully taken from his possession by the defendants and converted to their use. The plaintiff recovered, and from the judgment entered in his favor the defendants appealed to this court. * * *

The plaintiff had a lease of the land, upon which the hay and grain were raised, from one Hammond. The defendants were judgment creditors of Hammond, and took such hay and grain upon and by virtue of an execution issued upon a judgment against him. * * *

We think the uniform course of decision is that the measure of damages is the value of the property at the time fixed for the delivery, or at the time of the conversion, with interest to the day of trial; the only exception to the rule being that in case of replevin, where the property is in esse, and supposed to be in the hands of the defendant at the time of the trial, and plaintiff recovers, he may recover as his damages the value of the property on the day of trial, excluding any value added to the same by labor or money of the defendant or those under whom he claims. * * *

It is said that the rule giving as damages the highest market value, intermediate the conversion or day of delivery and the day of trial, should be applied to articles of trade and commerce which fluctuate in value from day to day, and that to adhere to rule of value at the time of the conversion would in many cases allow the wrongdoer to make profit out of his own wrong, or at all events it might prevent the plaintiff from taking advantage of a rising market, and thereby might de-

[58] Part of the opinion is omitted.

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prive him of his reasonable expectations of profit from his investments.

There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrongdoer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tort-feasor for the money he has received upon such sale of his property, and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or ownership of one person for a great length of time, and it would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have attained during the time of the conversion and the time of trial; and in those cases where the market value is very fluctuating great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if, after the lapse of five or six years, he should be called upon to pay the highest market value it had attained during the time. The hardship of enforcing this rule in the case of stocks, which is perhaps property of the most unfixed value, forced the Court of Appeals in New York to repudiate the rule, after it had been partially adopted by the courts of that state. * * *

The difficulties and injustice of the rule of the highest market price has led to various modifications of it by the courts which have adopted it, some courts having so modified it as to confine it to the highest price between the date of conversion and the commencement of the action, others to the time of the commencement of the action, provided the action be commenced within a reasonable time, and others between the time of conversion and the time of trial, provided the action be commenced within a reasonable time. * * *

Mr. Field, in his work upon the Law of Damages, after an examination of all the cases, says: "The rule of valuation of the property at the time of the conversion, with interest, prevails in Massachusetts, where there is no claim for special damages, and this general rule has been recognized in Pennsylvania, Kentucky, Missouri, West Virginia, New Hampshire, Connecticut, Maine, Vermont, Illinois. Wisconsin, Louisiana, Mississippi, Nevada, Florida, Delaware, Maryland, Minnesota, New York, Texas, and Iowa." * * *

The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether the taking was such as would formerly have been denominated trespass de bonis, or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts

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the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others.

We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited, and hold that in all actions either upon contract for the non-delivery of goods, or for the tortious taking or conversion of the same, "unless the plaintiff is deprived of some special use of the property anticipated by the wrongdoer," and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitory damages, the measure of damages is—first, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial; second, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; third, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted.

These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels when defendant holds possession of the same at the time of the trial, and on the whole be much more equitable than the rule given by the court below. * * *[59]

(C) Addition of Value by Wrongdoer.

MARTIN v. PORTER.

(Court of Exchequer, 1839. 5 Mees. & W. 351.)

At the trial before Parke, B., at the York spring assizes, it appeared that the plaintiff was a lessee of coal mines under the Duke of Leeds, and that the defendant was the owner of the adjoining estate. In the year 1838, in consequence of inquiries having been instituted, it was

[59] When the action is on a replevin bond, the value at the time of the trial must be the measure of damages, for the contract is to deliver or to pay the then value of the article replevined. Clement v. Duffy, 54 Iowa, 632, 7 N. W. 85 (1880).

Other important cases upon the higher intermediate value rule are Gallgher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658 (1889); Neller v. Kelley, 69 Pa. 403 (1871); Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462 (1870); Chadwick v. Butler, 28 Mich. 349 (1873); Cannon v. Folsom, 2 Iowa, 101, 63 Am. Dec. 474 (1856).

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discovered that the defendant had worked the coal under the plaintiff's land, to an extent exceeding a rood. The defendant, by paying money into court, admitted the trespass; and the only question at the trial was, upon what principle the damages were to be assessed; the plaintiff contending that he had a right to hold the defendant liable for the value of the coal when gotten, and when first it existed as a chattel, without any deduction for the expense of getting it; that he ought also to pay for the underground way-leave, having carried coals from his own colliery through the plaintiff's bed of coal. The learned judge was of opinion that the plaintiff would have been entitled in an action of trover to the value of the coal as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant any thing for having worked and brought it there; that, not having made such a demand, and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth; and that he was also entitled to compensation for the defendant's passing through his coal, with coals gotten from his own mines, and ought to pay as for a way-leave, which, in the neighbourhood of Leeds, was proved to be 2d. per ton. The jury adopted the above principle, and found the value of the coals, when got, to be £251. 9s. 6d.; and they also gave £50. for the use of the way-leave, making together £301. 9s. 6d. The learned judge gave the defendant leave to move to reduce the damages to £16., if this court should be of opinion that the proper measure of damages was the value of the coal in the bed, which the jury estimated at £149.[60]

Lord ABINGER, C. B. I am of opinion that there ought to be no rule in this case. If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How, then, can he now claim to deduct it? He cannot set up his own wrongs. The plaintiff had a right to treat these coals as a chattel to which he was entitled. He did so, and the only question then was their value. That the jury have found. It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail.

PARKE, B. I remain of the same opinion as I entertained at the trial. The plaintiff is entitled to be placed in the same situation as if these coals had been chattels belonging to himself, which had been carried away by the defendant, and must be paid their value at the time they were begun to be taken away. He had a right to them, without being subject to the expense of getting them, which was a wrongful act

[60] The statement as abridged from that of the official report, and arguments of counsel are omitted.

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by the defendant, and for which the defendant cannot claim to be reimbursed. I am not sorry this rule is adopted; as it will tend to prevent trespasses of this kind, which are generally willful.[61]

FORSYTH v. WELLS.

(Supreme Court of Pennsylvania, 1862. 41 Pa. 291, 80 Am. Dec. 617.)

LOWRIE, C. J. We are to assume that it was by mistake that the defendant below went beyond his line in mining his coal, and mined and carried away some of the plaintiff's coal, and it is fully settled that for this trover lies. Mather v. Church, 3 Serg. & R. 515, 8 Am. Dec. 663; Wright v. Guier, 9 Watts, 172, 36 Am. Dec. 108; Sanderson v. Haversteck, 8 Pa. 294; Stafford v. Ames, 9 Pa. 343; Backenstoos v. Stahler's Adm'r, 33 Pa. 251, 75 Am. Dec. 592.

What, then, is the measure of damages? The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labour in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavouring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and

[61] Alderson and Maule, BB., concur.

See, also, Jegon v. Vivian, L. R. 6 Ch. App. 742 (1871); Morgan v. Powell, 3 Q. B. 278 (1842); Wild v. Holt, 9 Mees. & W. 672 (1842); Llynvi Co. v. Brogden, L. R. 11 Eq. 188 (1870); Livingston v. Coal Co., L. R. 5 App. Cas. 33 (1880).

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detention of them. Dennis v. Barber, 6 Serg. & R. 426; Berry v. Vantries, 12 Serg. & R. 93; Taylor v. Morgan, 3 Watts, 333. Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus: M'Donald v. Scaife, 11 Pa. 381, 51 Am. Dec. 556. And so does trespass. Morrison v. Robinson, 31 Pa. 456.

In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained, without giving up any claim for any outrage or violence in the act of taking. Moore v. Shenk, 3 Pa. 13, 45 Am. Dec. 618. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough. McNair v. Compton, 35 Pa. 28.

When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary; because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation; but only to give him a more convenient form for recovering that much. Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of Silsbury v. McCoon, 4 Denio (N. Y.) 332, and 3 N. Y. 379, 53 Am. Dec. 307, warn us to be careful how we express ourselves on that subject.

We do find cases of trespass, where judges have adopted a mode of calculating damages for taking coal, that is substantially equivalent to the rule laid down by the common pleas in this case, even where no wilful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then, we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation. Martin v. Porter, 5 M. & W. 351; Wild, et al. v. Holt, 9 M. & W. 672; Morgan v. Powell, 3 Q.'s B. 283. And see 28 Eng. Law & Eq. 175. We prefer the rule in Wood v. Morewood, 3 Queen's B. 440, note, where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal

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field had been purchased from the plaintiffs. See, also, Bainbridge on Mines and Minerals, 510; Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268.

Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the raw either refuses the action of trover for the new article, or limits the recovery to the value of the original article. Silsbury v. McCoon, 6 Hill (N. Y.) 425, 41 Am. Dec. 753, and note; Hyde v. Cookson, 21 Barb. (N. Y.) 92; Swift v. Barnum, 23 Conn. 523; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239.

Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits. Morrison v. Robinson, 31 Pa. 456.

Judgment reversed, and a new trial awarded.

READ, J., dissented.

BEEDE v. LAMPREY.

(Supreme Court of New Hampshire, 1888. 64 N. H. 510, 15 Atl. 133.)

The defendant, while engaged in an operation on his own lot, negligently, but without malice, cut over the line dividing the lots, and cut down, trimmed, hauled to, and deposited in the lake at Melvin village, in Tuftonborough, and thence towed to his sawmill, the trees in question, which facts constitute the cause of action. The question whether the measure of damages is the value of the stumpage, or the value of the logs when cut and trimmed, or when deposited in the lake, or when delivered at the mill, was reserved.

ALLEN, J.[62] The claim of the plaintiff to recover as damages the value of the logs at the mill, which includes the value added by cutting and transporting them, is founded upon his title and right of possession of the property there, and his right to treat it as converted at any time between its severance from the realty and the commencement of the

[62] Part of the opinion is omitted.

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action. The plaintiff had the title to the logs and the right of possessing them at the mill. Whenever and wherever they may have been converted, the conversion did not change the title so long as the property retained its identity. The title could be changed only by a suit for damages with judgment, and satisfaction of that judgment. Smith v. Smith, 50 N. H. 212, 219; Dearth v. Spencer, 52 N. H. 213. The plaintiff might have recovered the logs themselves at the mill, or wherever he could have found them, and so availed himself of their value there, by replevin, or by any form of action in which the property in specie, and not pecuniary damages, are sought. But in such a case, if the claimant makes a title, no question of damages or compensation for loss arises. He recovers his own in the form and at the time and place in which he finds it. In trespass quare clausum, with an averment of taking and carrying away trees, the plaintiff may recover for the whole injury to the land, including the damage for prematurely cutting the trees, and for the loss of the trees themselves, but nothing for the value added by the labor of cutting and transporting them. Wallace v. Goodall, 18 N. H. 456; Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151.

Trover cannot be maintained for any injury to the realty, but only for the conversion of chattels; and in this case the plaintiff is limited in his recovery to the loss of the trees; that is, his loss by the defendant's converting them by their severance from the land. The usual rule of damages in actions of trover is compensation to the owner for the loss of his property occasioned by its conversion; and where the conversion is complete, and results in an entire appropriation of the property by the wrong-doer, the loss is generally measured by the value of the property converted with interest to the time of trial. Hovey v. Grant, 52 N. H. 569; Gove v. Watson, 61 N. H. 136. The defendant converted the logs by cutting and severing the trees from the land, and, the conversion being complete by that wrongful act, their value there represents the plaintiff's loss. His loss is no greater by reason of the value added by the labor of cutting and transportation to the mill. It does not appear that the logs were of special or exceptional value to the plaintiff upon the land from which they were taken, nor that he had a special use for them other than obtaining their value by a sale, nor that the market price had risen after their conversion. If, in estimating the damages, the value at the mill, increased by the cost of cutting and transportation, is to be taken as the criterion, the plaintiff will receive more than compensation for his loss. With such a rule of damages, if, besides the defendant, another trespasser had cut logs of an equal amount upon the same lot, and had hauled them to the lake shore, and a third had simply cut and severed the trees from the land, and sold them there, and suits for their conversion had been brought against each one, the sums recovered would differ by the cost of transporting the logs to the place of the alleged conversion, while the loss to the plaintiff would be the same in each of the three cases. The in-

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justice of such an application of the rule of damages is apparent from the unequal results. In Foote v. Merrill, supra, which was trespass quare clausum, and for cutting and removing trees, it was decided that the plaintiff could recover for the whole injury to the land, including the value of the trees there, but not any increase in value made by the cost of cutting and taking them away. In the opinion it is said (Hibbard, J): "If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps, in trover, and, possibly, in trespass de bonis asportatis, he may be entitled to the same benefit." This dictum, not being any part of, nor necessary to, the decision of that case, and given in language expressive of doubt, cannot be invoked as a precedent decisive of this case.

When trespass de bonis asportatis is coupled with trespass quare clausum, either as a separate count or as an averment in aggravation of damages, as in Foote v. Merrill, the increase in damages by reason of such averment and proof of it is the value of the chattels taken and converted; and in such a case is the same as the whole damages would have been in an action of trespass de bonis. Smith v. Smith, 50 N. H. 212, 219. Had the plaintiff in Foote v. Merrill, sued in trespass for taking and carrying away the trees merely, he would have recovered their value upon the lot at the time of the taking, allowing nothing for the expense of cutting and removing them; and no good reason appears why the same rule of damages should not prevail in trover as in trespass de bonis asportatis. The loss to the plaintiff from the taking and carrying away of his property is, ordinarily, the same as the conversion of it by complete appropriation, and the rule of compensation for the loss gives him the value of his property at the time and place of taking or conversion, and interest from that time for its detention.

The English cases upon the subject give as the rule of damages, when the conversion and appropriation of the property are by an innocent mistake, and bona fide, or where there is a real dispute as to the title, the value of the property in place upon the land, allowing nothing for enhancement of value by labor in its removal and improvement. But when the conversion is by fraud or willful trespass, the full value at time of demand and refusal is given. * * *

The Illinois decisions make no distinction between cases of willful trespass and those of conversion by mistake or inadvertence, and include in damages all enhancement in value, from any cause, before suit is brought. Robertson v. Jones, 71 Ill. 405; Coal Co. v. Long, 81 Ill. 359; Railroad Co. v. Ogle, 82 Ill. 627, 25 Am. Rep. 342. * * * The weight of authority, however, in this country is in favor of the rule which gives compensation for the loss; that is, the value of the property at the time and place of conversion, with interest after, allowing nothing for value subsequently added by the defendant, when

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the conversion does not proceed from willful trespass, but from the wrongdoer's mistake or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner or a contemplated special use of the property by him. Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617. * * *

The damages must be according to the usual rule in trover, which is the value of the property at the time of conversion, and interest after. The severance of the trees from the land, and their conversion from real to personal property, was in law a conversion of the property to the defendant's use. The value of the trees, immediately upon their becoming chattels—that is, as soon as felled—which is found to be $1.50 per thousand feet, with interest from that time, the plaintiff is entitled to recover. * * *

EATON v. LANGLEY.

(Supreme Court of Arkansas, 1898. 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474.)

Defendant, believing that he was the owner and that he had a right to do so, cut timber from plaintiff's land and manufactured it into cross-ties. The timber was worth 2 cents per tie when standing, and the ties, 3,500 in number, were worth 12½ cents each at the beginning of this action. The complaint alleged plaintiff's ownership of the ties and demanded possession thereof, or, if that could not be obtained, their value.

BATTLE, J.[68] * * * As a general rule, an owner cannot be deprived of his property without his consent, or operation of law. If unauthorized persons have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must be a limit to this right. Mr. Justice Blackstone lays down the rule, very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Comm. 404. Many authorities have followed this rule, while others have held that, in the case of a willful appropriation, no extent of conversion can give to the willful trespasser a title to the property, so long as the original materials can be traced in the improved article. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

In McKinnis v. Railway, 44 Ark. 210, and Stotts v. Brookfield, 55 Ark. 307, 18 S. W. 179, it was held that the owner of timber which had been taken and converted by a willful trespasser into cross-ties may recover the ties, or their value, in an action of replevin against the trespasser. In the latter case the court said: "While it is difficult to draw

[68] Part of the opinion is omitted, and the statement of facts is rewritten.

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from the authorities a rule by which we may determine with certainty what change in the original property converted will destroy its identity so that replevin will not lie for its recovery, it is settled that the conversion of timber into cross-ties is not such a change, whether the change has been wrought by a willful or an innocent wrongdoer." But there was no occasion for saying what was said as to innocent wrongdoers. In that case the defendant entered upon the land of plaintiff, and, without his authority or consent, knowing at the time his claim of ownership of the same, cut timber therefrom, and converted it into the cross-ties in controversy. Upon that fact the judgment of the court was based. In neither of these cases was any rule laid down by which the identity of the property can be ascertained.

The authorities generally agree in holding that when a party has taken the property of another in good faith, and, in reliance upon a supposed right, without intention to commit wrong, converted it into another form, and increased its value by the expenditure of money and labor, the owner is precluded from following and reclaiming the property in its new form if the transformation it has undergone has converted it into an article substantially different. But they have not agreed upon any rule by which it can in all cases be ascertained whether this transformation has or has not taken place. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. * * * But cloth made into garments, leather into shoes, trees hewed or sawed into timber, and iron made into bars, it is said, may be reclaimed by their owner in this new and original shape. * * * Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses." Wetherbee v. Green, 22 Mich. 318, 319, 7 Am. Rep. 653.

But the Supreme Court of Michigan (Mr. Justice Cooley delivering the opinion of the court) said that the test of the senses is unsatisfactory, and that "no test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative values." It said: "It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house, but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced, without trouble, into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without

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reason, and could not be tolerated. When the right to the improved article is the point in issue, the question how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached; and the musical instrument belongs to the maker, rather than to the men whose timber was used in making it, not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up, and rendered insignificant, the value of the original materials. The labor in the case of the musical instrument is just as much the principal thing as the house is in the other case instanced. The timber appropriated is in each case comparatively unimportant." Wetherbee v. Green, 22 Mich. 319, 320, 7 Am. Rep. 653.

Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653, was an action of replevin by the appellee against the appellant to recover a quantity of hoops made out of the timber of the former by the latter, in good faith, under what he supposed to be good authority. The timber in the tree was worth only $25, and the hoops made out of it were worth $700. The court held that the owner could not recover the hoops, but was entitled to the damages sustained by reason of the unintentional trespass. This decision was based upon the reason that the hoops were made in good faith, and upon the fact that the value of the timber, as compared with the value of the labor expended in making them, was insignificant.

In Mining Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520, the parties were owners of adjoining tracts of timbered land. In the winter of 1873–74 the Hertins, in consequence of a mistake respecting the boundaries, went upon the lands of the mining company, and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the mining company took possession of the wood, and converted it to their own purposes. The wood on the bank of the lake was worth $2.87½ per cord, and the value of the labor expended by the Hertins in cutting and putting it there was $1.87½ per cord—nearly doubling the value of the timber. After the mining company had taken possession of the wood, the Hertins brought an action against the mining company for the value of their labor expended in converting the timber into cord wood, and placing it upon the bank of the lake. The court held that they were not entitled to recover. Chief Justice Cooley (the same judge who delivered the opinion in Wetherbee v. Green, supra), in delivering the opinion of the court, said:

"It is on all hands conceded that where the appropriation of the property of another was accidental, or through mistake of fact, and labor has in good faith been expended upon it, which destroys its identity, or converts it into something substantially different, and the

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value of the original article is insignificant, as compared with the new product, the title to the property in its converted form must be held to pass to the person by whose labor, in good faith, the change has been wrought; the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is to so adjust the rights of the parties as to save both, if possible, or as nearly as possible, from loss. But, where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owners so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of $25, and converted them into hoops worth $700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

"But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in Wetherbee v. Green. The trees were not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed, as a rule, that a man prefers his trees cut into cord wood, rather than left standing; and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others, if such were the law? Whether mistake or not is all the same to him, for in either case he has employment, and receives his remuneration, while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake." See Grant v. Smith, 26 Mich. 201; Gates v. Boom Co., 70 Mich. 309, 38 N. W. 245.

Prof. Schouler, in his work on Personal Property, sums up the modern doctrine upon this subject as follows: "Where the trespass was not willful, but accidental, as through some mistake of fact, and the

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materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone further than the appropriated materials towards producing the present valuable chattel, the owner of the materials is still entitled to the chattel. But where no element of willfulness or intentional wrong whatever appears on the part of him who applied another's materials, and the identity of those materials has finally disappeared in the new product, or where it can be shown that his own labor and materials contributed essentially much more to the value of the present chattel than those materials which he took without intending a wrong, he shall keep the chattel as his own; making, however, due compensation to the owner of the materials for what he took." 2 Schouler, Pers. Prop. (2d Ed.) § 37.

On account of the conflict of opinion upon this subject, and the fact that this court is free from the restraints of precedents in respect thereto, we are at liberty to select the rule which is sustained by authority, and is in our opinion the wisest and most just. The rule as stated by Judge Cooley comes nearer approaching this standard. The increased value of the original materials furnishes no guide by which the merit of the laborer who has given them their new form can be determined. The increased value is the joint result of the original material, and the work and materials expended by the laborer in creating the new form. They may be equal, or the former may exceed the latter in value; and the increased value may exceed the aggregate value of the original materials and that expended upon them. Independent causes may contribute to the increased value. For instance, transportation to a market where the original material is scarce and in great demand may greatly increase its market value, or may diminish such value by the transfer to the place where the supply is greater and the demand is less than it is in the market from which it was shipped. So it cannot be said that the transportation added the increased value. Other causes—supply and demand—affected the value. So may labor change the original material into a new form, and increase the demand for it in that shape, and thereby enhance its value. Why, then, should the person who has made the expenditure be entitled to the difference between the aggregate value of his expenditure and the original material and the value of the article in its new form? He can lose no more than the value of his labor or other expenditure. His right to the property in its new form should not, therefore, in any case, be dependent upon its increased value, but upon the relative values of the original materials and his expenditures upon the same; and this should be considered only when the identity of the original article is susceptible of being traced, and then only when he has acted in good faith, and converted it into something substantially different, and the value of the original article, as compared with the value of that expended upon it, is so insignificant as "to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent

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at the first blush." In addition to the relative values, the injury inflicted upon the owner by the trespasser, and the injustice of taking from the former his property, against his will, at its market value, should be considered, and compared with the hardship the latter may suffer by the loss of his labor and other expenditures, in determining whether this appropriation would be such gross and palpable injustice as to give the innocent trespasser the right to the property in its converted form, as in Mining Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520. In this manner the rights of parties would be more nearly protected, and justice at the same time administered.

The value of the cross-ties in controversy was 12½ cents a tie. The value of each in the tree was two cents. The value of the labor expended upon them is not shown, but, assuming it to be the increased value of 10½ cents a tie, the difference between it and the value of the original material is not so great as to make the value of the latter, as compared with that of the former, insignificant, and to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice, at the first blush. The disparity is not so great as it was in Wetherbee v. Green, supra, in which trees of the value of $25 were cut and taken by one from the land of another, and converted into hoops of the value of $700, which was 28 times the value of the trees, while the cross-ties in this case were about six times; and yet the Supreme Court of Michigan, in Mining Co. v. Hertin, supra, said that "perhaps no case has gone further than Wetherbee v. Green."

In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them stand, and, if left standing for a few years, they might yield him a great profit; and the enhancement of their value by the labor of appellee might be a poor compensation for the wrong done. But, whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. * * * We think it would be lawful and right to allow appellant to recover the cross-ties, and to impose upon the appellee the consequences of his own carelessness.

But appellant has not obtained possession of the cross-ties. In the event he cannot do so, he is entitled to the value of the property he has lost. How is this value to be estimated? This question is not beset with the difficulties which attend the right of recaption. When the appellant sued for the possession of the cross-ties, he was entitled to their possession, unless he had lost his property by the wrongful act of another. If entitled to retake it in its new form, it must be tak-

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en as he found it, though enhanced in value by the labor of appellee. The ties cannot be restored to their original form. The appellee cannot force the appellant to become a debtor to him for the value of his labor, or demand compensation for his voluntary additions to the value of the trees converted into ties, without the assent of the appellant. He cannot impose any conditions upon the right to retake them. The question therefore being whether the appellee shall lose his labor, or the appellant lose the right to take his property, the law decides in favor of the latter. But in determining the compensation the appellant shall receive as the value of his property which has been wrongfully converted this difficulty does not arise. The value of the property of the owner, which has been converted, can be ascertained and fixed without including therein the labor expended upon it. Hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover. * * *

As to the extent of this limitation the authorities are not agreed. But we think that inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal property in the new form into which it has been converted inadvertently, under a bona fide but mistaken belief of right, "in case a delivery cannot be had," is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the increase. Weymouth v. Railway Co., 17 Wis. 550, 84 Am. Dec. 763.

WHITE et al. v. YAWKEY.

(Supreme Court of Alabama, 1896. 108 Ala. 270, 19 South. 360.)

HEAD, J.[64] The case was tried in the lower court upon the second count of the complaint, which was in trover, and claimed damages "for the conversion of 100 pine logs cut and taken away" from the lands of the plaintiff. The material facts are that, within a year prior to the commencement of the suit, one Jack Brewer cut the pine logs from the timber lands belonging to the plaintiff, and sold them to the defendants to be delivered on the banks of Pea river, where he did in fact deliver them; and that neither he nor the defendants knew at the time the cutting was done that trespasses were being committed on the plaintiff's property, this fact not having been discovered until a survey was made, some time after the acts complained of had been

[64] Part of the opinion is omitted.

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performed. The defendants disposed of the logs, which were worth four cents per foot, at Pea river. * * * With a view to mitigating the damages, the defendants offered to prove the value of the logs prior to their removal from the land, accompanying the offer with the statement to the court that they expected to prove the logs were worth materially more after being transported to and placed on the banks of Pea river than they were before such removal. The court refused to allow this proof to be made, and to the ruling an exception was duly reserved. This presents the single question of merit to be decided upon the appeal.

It will be observed from the foregoing statement, that the record makes the case of a conversion by purchasers, innocent of wrongdoing, from an inadvertent trespasser, who, by the expenditure of time, labor, and, doubtless, money, had enhanced the value of the pine logs, after their severance from the freehold and transformation into chattels. The effect of the ruling of the circuit court was to exclude from the jury all evidence upon the subject of value, except that confined and limited to the place of delivery to the defendants, and thereby to necessitate a verdict for the value at that place, as being the only authorized measure of damages, justified by the facts of the case. * * * The modern authorities are practically unanimous in holding that the rule of just compensation for the injury sustained, which is the ideal measure of actual damages, does not require the assessment, against an inadvertent trespasser, of the accession to the value of a chattel which his labor has produced, but that he is entitled to an abatement therefor from the enhanced value. * * * The same rule prevails when trover is brought against the unintentional trespasser's innocent vendee, who is treated as standing in the shoes of his vendor. * * *

It is no answer to this to say that the plaintiff might have brought detinue for the logs wherever he might have found them, short of a change of identity, and thereby have recovered them in specie after their value had been enhanced. In detinue the title prevails, and the question of damages is not considered. If a party aggrieved elects to bring the equitable action of trover, the assessment of damages may be so adjusted as to compensate the plaintiff for his injury, without paying him a premium, or depriving an innocent party of that which he has in good faith added to the chattel. Weymouth v. Railway Co., 17 Wis. 550, 84 Am. Dec. 763. The rule is different if the trespass is willful or in bad faith. * * *

The authorities do not agree upon the question whether, in trover against an inadvertent trespasser, or his innocent vendee, for severed portions of the realty, the rule is to allow the value of the property in place, as if it had been purchased in situ by the defendant, at the fair market value of the district—as, for instance, the value of timber standing, or, for coal or ore mined, the value in place—or whether the value to be taken as the basis of recovery is that of the property converted immediately after severance, when it becomes a chattel. The

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case of Wood v. Morewood, 3 Q. B. 440 (which is regarded as conflicting with the earlier English cases), is the leading English, and Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617, subsequently criticised in that state, is one of the leading American, cases supporting the rule first stated, and they have been frequently followed. Many cases which are often cited in favor of the same rule may be distinguished by noting that they were not actions of trover, or that they arose in states which have abolished forms of action, or that the decisions were made in proceedings in equity where the courts were not influenced by the technical rules governing the various common-law actions. In this state, forms of action have not been abolished, and parties must be here held to the legitimate and logical consequences of the particular action which has been instituted.

Trover is brought for the conversion of personal property, and it would seem incongruous to say that the damages could be assessed upon the principle adopted in actions of trespass quare clausum fregit, when the gravamen of the complaint is essentially different. Cases can be easily perceived in which the value of the timber after severance would very inadequately compensate the owner for the trespass. This would be so when the trees were prematurely cut, or were valuable for shade or fruit. Under such circumstances, he may accommodate his selection of a form of action to the necessities of the case, and bring trespass for entering his land, and severing and removing timber or trees, in which case he would recover, as actual damages, the diminished value of the land, or, to state it more definitely, the value of the trees standing and any injury to the freehold by reason of their removal. * * *

When trover is brought, the trespass upon the land is, so to speak, waived or disregarded; and when brought for the conversion of logs or trees as chattels, under the circumstances of this case, the true rule, in our opinion, is the second above stated, according to which the value immediately after severance, with interest, furnishes the proper measure of recovery. * * *

The circuit court erred in rejecting the proffered proof. * * *

GASKINS v. DAVIS.

(Supreme Court of North Carolina, 1894. 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439.)

AVERY, J.[65] The plaintiff's complaint is in the nature of a declaration for trespass in the entry by the defendant upon her land, after being forbidden, and cutting, carrying away, and converting to his own use valuable timber that was growing thereon, to her damage $500. The logs, after being severed, were transported to Newbern in

[65] Part of the opinion is omitted.

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two lots, one of which lots was seized by plaintiff after reaching that city, where it was much more valuable than at the stump, and was sold by her for the sum of $112. The other lot was converted into boards and sold by the defendant. The defendant, for a second defense, sets up by way of counterclaim the seizure of the logs by the plaintiff. * * *

The well-established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land and became a chattel (Bennett v. Thompson, 35 N. C. 146), together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel, instead of a part of the realty belonging to her. Potter v. Mardre, 74 N. C. 40. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or willfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article, in its altered state, cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith, and under an honest belief that the title was in him." * * *

The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass—the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. Potter v. Mardre, supra; 5 Am. & Eng. Enc. Law, p. 36; Ross v. Scott, 15 Lea (Tenn.) 479. The character of the logs had not been changed by cutting and transporting to Newbern, but the value had probably been greatly enhanced. The approved rule, where the plaintiff is asking damage for trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed, and without abatement for the cost of severance. Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280. But, if he prefers to follow and claim the timber removed, he is entitled to do so, as long as the species remains unchanged. The plaintiff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled, by way of recoupment, to the benefit of the enhanced value imparted to the property by transporting it to market? * * *

It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doctrine of bet-

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terments, for additional value imparted to the property after its conversion into a chattel, and before it is changed into a different species? The judge below, in allowing the defendant, by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the Newbern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In Ross v. Scott, supra, where it appeared that the defendant had entered upon land to mine for coal, and, under the honest but erroneous belief that he was the owner, had built houses thereon, it was held that the plaintiff might recover the cost of the coal in situ, subject to reduction by an allowance for permanent improvements put upon the land. * * * The weight of authority, it must be conceded, sustains the rule that, where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. * * * In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule, as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees.

It being settled in this state that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further, though it may sometimes subject a mistaken trespasser to hardship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land, either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market, or by any improvements in its condition short of an actual alteration of species. In Weymouth v. Railroad Co., 17 Wis. 550, 84 Am. Dec. 763, the court say: "In determining the question of recaption the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law, therefore, being obliged to say either that the wrongdoer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defend-

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ant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrongdoer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrongdoer shall lose." Isle Royal Mining Co. v. Hertin, 26 Am. Rep. 529, note.

When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right given her by law to peacefully regain possession of her own chattels wherever found. She was guilty of no infringement of the rights of the defendant, for which an action would lie. It is familiar learning that a defendant can only maintain successfully a counterclaim when it is of such a nature that he could recover upon it in a separate suit brought against the plaintiff. The defendant could not recover, therefore, either in a distinct action for the taking of the logs, or by way of counterclaim. When the plaintiff recaptured the logs she was guilty of no wrong, and the question of title to the property so rightfully taken was eliminated from all possible future controversy. Her remedy by act of the law remained as to so many of the logs as she had not regained possession of by her own act. After she had recaptured one lot the property in them in their altered state, and at the new situs, revested in her, with the absolute jus disponendi, as in the case of her other personal property. * * *

BOLLES WOODENWARE CO. v. UNITED STATES.

(Supreme Court of United States, 1882. 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230.)

Indians knowingly and wrongfully cut timber from the public lands, known as the "Oneida Reservation," in Wisconsin, and, after carrying it some distance, sold it to the defendant company, which was not chargeable with any intentional wrong or bad faith. The timber, when felled, was worth 25 cents per cord. The defendant paid for it $3.50 per cord, and it had purchased 242 cords. Judgment was rendered for the government at the rate of $3.50 per cord.

MILLER, J.[66] * * * The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the House of Lords, in the case of Livingston v. Coal Co., L. R. 5 App. Cas. 33, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and mak-

[66] Part of the opinion is omitted.

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ing him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

There seems to us to be no doubt that in the case of a willful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. Single v. Schneider, 24 Wis. 299; Weymouth v. Railroad Co., 17 Wis. 567, 84 Am. Dec. 763. On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Winchester v. Craig, 33 Mich. 205, contains a full examination of the authorities on the point. Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; Baldwin v. Porter, 12 Conn. 484. While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued. It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would

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be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff. On what ground, then, can it be maintained that the right to recover against him should not just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser. But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth $850, and he wants to satisfy the claim of the government by the payment of $60. He founds his right to do this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property, he purchased of the wrongdoer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but, as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none. * * *[67]

II. Reduction of Original Loss.

MURPHY v. CITY OF FOND DU LAC.

(Supreme Court of Wisconsin, 1868. 23 Wis. 365, 99 Am. Dec. 181.)

Paine, J.[68] The instruction that although placing the dirt on the plaintiff's lot may have improved its value, she would be entitled "to recover as damages what it would cost to remove the same," was erroneous. The fact that a trespass may have benefited the property invaded cannot constitute a complete defense. The party is always entitled to nominal damages, for the vindication and protection of his right. But beyond this, except in cases where exemplary damages may

[67] See, also, the following important cases: Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653 (1871); Winchester v. Craig, 33 Mich. 207 (1876); Tuttle v. White, 46 Mich. 487, 9 N. W. 528, 41 Am. Rep. 175 (1881); Weymouth v. C. & N. W. R. R., 17 Wis. 567, 84 Am. Dec. 763 (1863); Single v. Schneider, 24 Wis. 299 (1869); 30 Wis. 570 (1872); I. & St. L. R. & C. Co. v. Ogle, 82 Ill. 627, 25 Am. Rep. 342 (1876); Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151 (1874). In Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307 (1850), is to be found an exhaustive discussion of the question when title passes to the converter by change in the original form and substance of the property converted. See, also, article in 16 Harv. Law Rev. 589, and Abbott's Cases on Personal Property.

[68] Part of the opinion is omitted.

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be given, he is confined to his actual damages. And this being so, the incorrectness of this instruction is apparent. It assumes that the jury might be satisfied from the evidence that the placing of the dirt on the lot was really a benefit to it, and increased its value, yet be required to give the plaintiff as damages what it would cost to remove it. Suppose a trespasser fills up a water lot, which, without being filled, is useless. Could the owner recover the cost of removing the dirt, as damages for the trespass, and at the same time leave it on the lot and enjoy the benefit of it? Suppose the trespasser should grade a lot which was previously inaccessible, and greatly increase its value by the grading. Could the owner take the advantage, and yet recover the cost of replacing the dirt in its former position? These illustrations seem sufficient to show that the rule given to the jury cannot be the proper rule of damages.

Undoubtedly the plaintiff would have been entitled to an instruction that in determining whether the lot was benefited or not, the jury should consider the uses and purposes to which she intended to devote it. But, in the absence of any thing to the contrary, it is to be presumed that they were properly instructed on this point, and gave to those circumstances proper consideration. And although, after doing so, they should come to the conclusion that the act complained of really caused no damage whatever, but on the contrary was a benefit to the plaintiff, they were required to give her arbitrarily as damages what it would cost her to remove the dirt. * * *[69]

EDMONDSON v. NUTTALL.

(Court of Common Pleas, 1864. 17 C. B. [N. S.] 279.)

In July, 1860, the plaintiff agreed with the defendant for standing and power for twelve looms in the defendant's mill, for which he was to pay 9¾d. per week for each loom. See Hancock v. Austin, 14 C. B. (N. S.) 634, where it was held that these weekly payments could not be distrained for as "rent." After the looms had been at work for about two years, the plaintiff being in arrear with his weekly payments, and being unable to pay, it was agreed that the defendant should take five of the looms in satisfaction. The plaintiff becoming again in arrear for the standing of his remaining looms, the defendant sued him in the county court, and on Friday the 29th of January, 1864, obtained judgment against him for £28. debt, and £11. 15s. costs; and the judge made an order on the plaintiff to pay these sums on the following Monday.

On Saturday, the 30th, the plaintiff went to the mill for the purpose of removing his looms. The defendant did not then refuse to allow

[69] Accord: Luther v. Winnisimmet Co., 9 Cush. (Mass.) 171 (1851); Mayo v. Springfield, 138 Mass. 70 (1884); Jewett v. Whitney, 43 Me. 242 (1857).

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him to take them away, but desired him to come on the following Monday. On the Monday, the plaintiff made a formal demand for the looms, and the defendant said he could not have made them then, as he (the defendant) was going out; and on Tuesday the looms were seized (and subsequently sold for £24. 17s.) under an execution from the county court at the defendant's suit. The writ in this action was issued on the same day.

The jury returned a verdict for the plaintiff on the trover count, damages ¼d.; and they found the value of the looms to be £35.

The learned judge thereupon reserved leave to the plaintiff to move to increase the damages to £35., if the court should be of opinion that he ought to have directed the jury to find for the value of the looms seized—neither party to appeal without the leave of the court.[70]

WILLES, J.[71] I am of the same opinion. The measure of damages for the conversion of goods is prima facie their value. The direction, therefore, of my Brother Blackburn to the jury in this case was wrong, unless there were circumstances to make some other principle applicable. Such circumstances may exist either where the plaintiff has only a limited interest in the goods at the time of the conversion, or where the defendant has a lien upon them, or, as in Brierly v. Kendall, 17 Q. B. 937, where the plaintiff had a defeasible right to the possession of them. There is nothing to make this case an exception from the general rule, that the plaintiff is entitled to recover all he has lost by the defendant's wrongful act. Then, there is the case in which the goods wrongfully seized have been afterwards returned. The cases of Fouldes v. Willoughby, 8 M. & W. 540, and Harvey v. Pocock, 11 M. & W. 740, afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored, and the plaintiff has consented to take them back in discharge of the claim, that might perhaps be pleaded by way of accord and satisfaction: if not, it would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion. There is also another case in which the mitigation of damages is allowed upon a very peculiar ground,—the case of one who, as executor de son tort, has dealt with the goods of the deceased in a due course of administration, and relies on that as an answer to an action brought against him by the real executor appointed under the will. There, the character of the act of wrong is determined at the time it is done. The law, however, regards it with so much favor, that, if the real executor would have done the same, no recovery is allowed against the executor de son tort in respect of damages for that part of the estate which has been so applied. In all these cases, the damages are allowed to be mitigated, either in respect of the interest of the plaintiff in the goods being less,

[70] The statement of the case is abridged from that of the official report.
[71] Part of the opinion is omitted.

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or of his having already received a partial satisfaction of the damages, or of the act being an act having a rightful character in respect of the persons towards whom it is done and in whose favor it operates at the time. But that principle cannot apply here, where the plaintiff had an unqualified right at the time to do as he liked with the goods, and the act of the defendant was wrongful and without any justification. I cannot help thinking that we should be violating the rule of law which prohibits a man from taking advantage of his own wrong, if we were to hold that the defendant's execution was to have a greater advantage or to be more beneficial to him by reason of his wrongful act in seizing and detaining the plaintiff's goods for the purpose of making them amenable thereto. There clearly was nothing like a redelivery of the goods to the plaintiff here. * * *

Verdict for plaintiff for £35.

CARPENTER v. DRESSER.

(Supreme Judicial Court of Maine, 1881. 72 Me. 377, 39 Am. Rep. 337.)

PETERS, J.[72] A deputy sheriff wrongfully attached the plaintiff's goods, dispossessing the plaintiff and putting a keeper in charge of his store. On the next day, the deputy tendered to the plaintiff a return of the goods uninjured, and in the same condition as when attached the day before. The plaintiff refused to receive them.

It was ruled, at the trial, that the damages for the attachment and taking, should be limited to any injury necessarily sustained by the plaintiff, by the disturbance of his possession from the date of the attachment to the date of the offered return. This was error. The general rule of damages applies in such case. The plaintiff was entitled to recover what the entire property was worth when it was attached. A return of property in mitigation of damages could not be forced upon the owner against his consent.

When repossession and redelivery are spoken of, in the cases relied upon by defendant, as going in mitigation of damages, it has reference to a return of the property with the consent of the owner. A person cannot be said to possess, who does not consent to the possession. Nor can there be a redelivery where there is no acceptance. A mere offer to deliver is not a delivery.

It has been held that an officer, liable as a trespasser for irregularly distraining goods for taxes, may be entitled to have the amount of the taxes deducted from the damages recoverable against him, the taxes being regarded as thus cancelled and paid. It is for the owner's benefit in such case that the tax be regarded as paid. And other cases founded upon the same or a similar principle may be found. But in all of

[72] Part of the opinion is omitted.

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them the doctrine is founded upon the idea, that the deduction or mitigation is allowed with the implied assent of the owner. The case at bar is not such a case. * * *

KALEY v. SHED.

(Supreme Judicial Court of Massachusetts, 1845. 10 Metc. 317.)

Trespass for taking and carrying away divers goods of the plaintiff, alleged to be of the value of $115. At the trial in the court of common pleas, before Wells, C. J., there was evidence tending to show that said goods were taken and carried away from the plaintiff's dwelling house by the defendant, while acting as a constable, under a search warrant; that they were not the goods mentioned in that warrant; that while they were detained by the defendant, the plaintiff made a demand on the defendant to return them to him at a place designated; that to this demand the defendant replied that he would so return them; and that while he was apparently preparing so to do, the goods were attached as the property of the plaintiff by another officer, on a writ sued out against the plaintiff by O. A. Richardson, and were delivered into the attaching officer's hands.[73]

SHAW, C. J.[74] This was trespass de bonis asportatis against the defendant, who is a constable, charging the unlawful taking of the goods specified. It appears that the goods were taken from the plaintiff's house, by the defendant, whilst in the execution of a search warrant; but not being the goods specified in the warrant, the taking was not justified by it, and was of course a trespass. It was, however, probably not a case for exemplary damages, and any claim to such damages was waived.

It appears to us that the directions given by the court were strictly correct in point of law, and qualified with great precision and accuracy. Had the goods been in fact returned to the plaintiff, it would not have purged the trespass, nor barred the action; but it would have prevented the plaintiff, if they had been restored in as good a plight as when taken, from recovering the value in damages. Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; 1 Rol. Ab. 5; Moon v. Raphael, 2 Scott, 489, 2 Bing. N. R. 310.

The instruction excludes all collusion, between the defendant and the attaching creditor or officer, to cause or expose the goods to be attached. The plaintiff had demanded the goods, the defendant had yielded to that demand, and whilst preparing to deliver them, they were attached as the property of the plaintiff, and taken into custody by the attaching officer. The property was thus in the custody of the law by legal process, which the defendant could not resist or control. They

[73] The statement of the case is abridged from that of the official report.

[74] Part of the opinion is omitted.

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went to the plaintiff's benefit, as much as if they had been returned, and such application operates to the same extent in mitigation of damages. Squire v. Hollenbeck, 9 Pick. 551, 20 Am. Dec. 506; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396. That they must enure to his benefit seems obvious. The plaintiff's case assumes that the goods were his property. They were attached as his. If the creditor recovers judgment and takes them in execution, they go to pay his debt; if not, they are laid up in the custody of a responsible officer of the law for his use, to be delivered on demand. In no event could the defendant claim them. * * *[75] Judgment for plaintiff for $10.58.

LAZARUS v. ELY.

(Supreme Court of Errors of Connecticut, 1878. 45 Conn. 504.)

PARDEE, J.[76] Lazarus, having for his own accommodation obtained Ely's endorsement upon his note, allowed it to go to protest; before paying it, Ely prayed out a writ in due form of law against him, and thereon attached certain articles of personal property. Three days later, Ely, having paid the note, abandoned his writ and suit, reattached the same property upon another writ, caused it to be duly returned to court, obtained judgment thereon, sold the property on execution for the sum of $130.50, and applied $118.77 towards the satisfaction of his judgment, the remaining $11.73 having been consumed in the expenses attendant upon the sale.

Lazarus brought this action of trespass and trover against Ely for the original taking, to the city court of Hartford. That court laid down the following rule for the assessment of damages, namely, to the value of the property when first taken add the loss sustained by Lazarus by the unlawful detention until the second attachment; from the amount deduct $118.77 by which his debt to Ely was reduced, and

[75] Collins, J., in Carpenter et al. v. American Building & Loan Association, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345 (1893):

"It is well settled, as a general proposition, that when an actual conversion of chattels has taken place the owner is under no obligation to receive them back, when tendered by the wrongdoer. 6 Bac. Abr. 677; 9 Bac. Abr. 559; 4 Amer. & Eng. Enc. Law, 125, and cases cited. The right of action is complete and perfect when the conversion takes place, and the object of the action is to recover damages, not to regain possession of the thing itself. Even if the goods be returned by the wrongdoer, and are accepted by the owner, after the action is brought, damages, nominal or actual, may be recovered. There is a class of cases when, in trespass or trover, the defendant may mitigate the damages by a timely and proper return of the property. The rules which govern in such cases seem to be that where the wrong lacks the element of willfulness—has been committed in good faith—the court, in its discretion, may order a return, upon timely application by the defendant, accompanied by an offer to pay all costs, and a showing that no real injury will have been suffered by the plaintiff when possession is restored. The right of action is not defeated by the order of the court, but damages are mitigated."

[76] Part of the opinion is omitted.

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assess the remainder as damages. The court found the value of the property when taken to have been $175; from this was deducted the $118.77; and judgment was rendered against Ely for the difference, namely, $56.23. Ely filed a motion in error.

In Baldwin v. Porter, 12 Conn. 473, this court said as follows: "That the value of the property converted is the general rule of damages in an action of trover is admitted. To this rule there are exceptions. And both the rule and the exceptions proceed upon the principle that the plaintiff ought to recover as much damages as he has actually sustained and no more; which commonly is the value of the property, and hence the general rule. No good reason, consistently with moral principle, can be suggested why greater damages should ever be recovered than have in truth been sustained, except in those cases where the law permits, by way of punitive justice, the recovery of vindictive damages. Such damages are never recoverable in the action of trover. On this principle, if after conversion the property be restored before suit, damages for the detention only can be recovered." In Curtis v. Ward, 20 Conn. 204, Ward attached certain articles of personal property upon process legally issued against Curtis, and held possession thereof for about two months, when the attachment was abandoned, the endorsement of service erased from the writ, a new attachment and service made, and the writ with the endorsement of the last service was returned to court. Ward obtained a judgment, sold the property upon execution, and applied the proceeds in satisfaction of his judgment. Curtis, having brought an action of trover for the original taking, the court thus stated the rule of damages:—"The plaintiff insists that he is entitled to recover the value of the goods at the time of the conversion with interest. This claim of the plaintiff would be well founded, had he never, subsequent to the conversion, received any benefit from the property. Such undoubtedly is the general rule in relation to damages in an action of trover. * * * But to this general rule there are certain exceptions, as well established, says Morton, J., as the rule itself. Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396. Thus, if the property for which the action is brought has been returned to and received by the plaintiff, it shall go in mitigation of damages. So, if goods are tortiously taken, and a creditor of the owner afterwards attaches them, and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking, but in mitigation of damages. For it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debt, and then afterwards recover that value from another, who has derived no substantial benefit from his property. This rule is not only in conformity with justice but has the sanction of authority. Pierce v. Benjamin, supra. The case under consideration is not, in principle, distinguishable from those stated. The evidence offered goes to show that the plaintiff has

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been once paid for his goods, by a legal appropriation of them to the payment of a judgment against him; and no principle of justice requires that he should be again paid for the same property. The defendants ought to be responsible to the extent of the wrong they have committed and no further." This rule was reaffirmed in Cook v. Loomis, 26 Conn. 483. * * *[77] Reversed.

YATES v. WHYTE et al.

(Court of Common Pleas, 1838. 4 Bing. 272.)

The plaintiff sued the defendant for damaging his ship by collision. The plaintiff had already collected £172. on a policy of marine insurance. The defendants claimed that this sum should be deducted from the allowance for damages which had been proved.

TINDAL, C. J.[78] I think this case is decided in principle by that of Mason v. Sainsbury, 3 Doug. 60. There, a party whose property had been burnt by a mob was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute 1 Geo. I. for the benefit of the insurers. The only distinction between that case and the present is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that a recovery upon a contract with the insurers is no bar to a claim for damages against the wrongdoer. Lord Mansfield says, "Though the office paid without suit, this must be considered as without prejudice; and it is, to all intents, as if it had never been paid. The question comes to this: Can the owner of the house, having insured it, come against the hundred under this act? Who is first liable? If the hundred be first liable, still it makes no difference. If the insurers be first liable, then payment by them is a satisfaction and the

[77] See, also, the important cases of Fowler v. Gilman, 13 Metc. (Mass.) 267 (1847); Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396 (1833); Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 3, 28 Am. Dec. 268 (1835); Hopple v. Higbee, 23 N. J. Law, 342 (1852).

Earl, C., in Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511 (1871):

"After a conversion of property, the title still remains in the owner, and the property can be taken from the wrongdoer upon an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrongdoer can set up this seizure and sale, not as an entire defence, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defence, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it. But to protect the wrongdoer, as the law is settled in this state, the seizure must be at the instance of a third person, and not at the instance of the wrongdoer, or upon process in his favor."

[78] Only the opinions of Tindal, C. J., and Park and Bosanquet, JJ., are here given, and the statement of facts is rewritten.

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hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the insurer. In abandonment it is so; and the insurer uses the name of the insured. It is an extremely clear case. The act puts the hundred in the place of the trespassers; and on principles of policy, I am satisfied it is to be considered, as if the insurers had not paid a farthing." That the insurers may recover in the name of the assured after he has been satisfied, appears from Randal v. Cockran, 1 Ves. Sr. 98, where it was held that they had the plainest equity to institute such a suit. Such therefore is the situation of the underwriters here, that this case has received its answer from it. If the plaintiff cannot recover, the wrongdoer pays nothing, and takes all the benefit of a policy of insurance without paying the premium. Our judgment must be for the plaintiff.

PARK, J. I am of the same opinion. This point has been decided ever since the time of Lord Hardwicke; so much so that it has been laid down in text-writers, that where the assured, who has been indemnified for a wrong, recovers from the wrongdoer, the insurers may recover the amount from the assured. In Randal v. Cockran, 1 Ves., Sr. 98, it was said they had the clearest equity to use the name of the assured, in order to reimburse themselves, and in Mason v. Sainsbury, 3 Doug. 60, the judges were all unanimous. They held indeed that the insurers could not sue in their own names; but they confirmed the general doctrine, that the wrongdoer should be ultimately liable, notwithstanding a payment by the insurers.

BOSANQUET, J. I am of the same opinion, and consider the case as decided by Mason v. Sainsbury, 3 Doug. 60, in 1782. It is true that in Clark v. Hundred of Blything, 2 B. & C. 254, Lord Tenterden made observations on the subject of the statute of 1 Geo. I; but there was nothing in those observations to impeach the case of Mason v. Sainsbury, 3 Doug. 60, where Buller, J., said: "Whether this case be considered on strict or on liberal principles of insurance law, the plaintiff must recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, strictly taken, is a wager; liberally, it is an indemnity: but on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted, that the hundred is put in the place of the trespassers. How could the trespassers have availed themselves of this satisfaction, made by the office? Could they have pleaded it by way of accord and satisfaction? It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle is, that the insurer and insured are as one person; and in that light, the paying before, or after, can make no difference." There, the action was brought for the benefit of the underwriters; here, the plaintiff sues on his own account. But I think that makes no difference; for

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he has the legal right to the damages, and if the underwriters have an equitable right they will establish it in another court.

Judgment for plaintiff.

PERROTT v. SHEARER.

(Supreme Court of Michigan, 1868. 17 Mich. 48.)

COOLEY, C. J.[79] The plaintiff in error, as sheriff of the county of Bay, by virtue of a writ of attachment against the goods and chattels of Henry H. Swinscoe, levied upon a stock of goods which Shearer claimed, as assignee of the firm of Swinscoe & Son, composed of said Henry H. Swinscoe and George E. Swinscoe. * * *

The principal question in the case springs from the fact that the goods, while under the control of the defendant, in pursuance, as the plaintiff claimed, of said attachment levy, were accidentally destroyed by fire. The plaintiff, it appears, held at the time, insurance policies upon them to their full value, and, after the fire, presented to the insurance companies proofs of the loss, and received pay therefor. Upon this state of facts it was claimed by defendant, that plaintiff's position was the same as if he had repossessed himself of the goods by replevin; and that he was entitled to recover damages only for their detention up to the time of the fire. The circuit judge held differently, and instructed the jury that the plaintiff was entitled to recover the full value of the goods, and he had judgment for the value accordingly.

It certainly strikes one, at first, as somewhat anomalous, that a party should be in position to legally recover of two different parties the full value of goods which he has lost; but we think the law warrants it in the present case, and that the defendant suffers no wrong by it. He is found to be a wrongdoer in seizing the goods, and he cannot relieve himself from responsibility to account for their full value except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands, was one of the risks he run when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured, he cannot be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is, therefore, entitled to the benefit of

[79] Part of the opinion is omitted.

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it, if any benefit shall result. The trespasser pays nothing for it, and is, therefore, justly entitled to no return. The case, we think, is within the principle of Merrick v. Brainard, 38 Barb. (N. Y.) 574, which appears to us to have been correctly decided. The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods; and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fairly compensated. It is not a question of importance in this inquiry, whether the act of the defendant caused the loss or not—his equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to this is, that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities. * * *[80]

VARNHAM v. CITY OF COUNCIL BLUFFS.

(Supreme Court of Iowa, 1879. 52 Iowa, 698, 3 N. W. 792.)

Action at law to recover for personal injuries sustained by plaintiff from falling into a pit negligently made and permitted by defendant in a public street in the city. There was a verdict and judgment for $1,100 for plaintiff. Defendant appeals.

BECK, C. J.[81] * * * It was shown by plaintiff's testimony that she lived with her daughter who, for many weeks while the mother was suffering from the injuries, nursed her and bestowed the care and services demanded by her condition. The daughter was a witness and was asked this question: "What was the service she (plaintiff) has had in attending on her worth?" (referring to services rendered while she was suffering from the injuries). The answer was "three hundred dollars." It is insisted that this answer did not establish the value of the services. It surely did, in the plainest language, give the estimate of the witness, and that was all she was asked to give or could give.

It is also objected that the daughter could not recover, in the absence of an agreement, from the mother for these services, and the testimony was therefore, incompetent. But it does not follow that plaintiff cannot recover because the services were rendered to her gratui-

[80] That insurance money received by him shall not go in reduction of the plaintiff's damage occasioned by defendant's wrongful act, see, further, Bradburn v. G. W. Ry. Co., L. R. 10 Exch. 1 (1874); Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 800 (1888).

The rule is the same with respect to life insurance. Sherlock v. Alling, Adm'r, 44 Ind. 199 (1873); B. & O. R. R. Co. v. Wightman's Adm'r, 29 Grat. (Va.) 431, 26 Am. Rep. 384 (1877).

[81] Part of the opinion is omitted.

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tously. The defendant ought not to profit by the generosity of the daughter, or on account of the relation between the plaintiff and her nurse. The defendant ought to pay the damages sustained by plaintiff. Outlays and services in nursing her are proper elements whereon damages are based. * * *[82]

WHITELY v. MISSISSIPPI RIVER W. P. & B. CO.

(Supreme Court of Minnesota, 1888. 38 Minn. 523, 38 N. W. 753.)

Proceedings for the condemnation of certain lands of the appellants. The commissioners had awarded $740, from which an appeal had been taken to the District Court, where a verdict was had for $2,500. That court afterward set this verdict aside. From this order an appeal is prosecuted. It appeared that the proposed improvement would cause a large portion of appellant's land to be overflowed.

VANDERBURGH, J.[83] * * * The court also states, as a further ground for its decision, that the jury did not give due weight "to the evidence of the benefits to the land adjoining the overflow." It does not appear, however, that this reason was controlling, nor are we able certainly to conclude from the record that the court adopted a wrong rule in applying the evidence in relation to the allowance of benefits. But, in view of another trial, we ought to express our opinion on this and one or two other questions likely to again arise. The plaintiff, if he had asked therefor, was undoubtedly entitled to more explicit instructions defining the rule on the subject of benefits, applicable to this class of cases, than was given. The benefits to be considered and allowed by the jury, where only a part of an entire tract is taken, are not such as are common to lands generally in the vicinity, but such as result directly and peculiarly to the particular tract in question; as, for instance, where property is made more available and valuable by opening a street through it, or when land is drained or otherwise directly improved. So, in this case, if any part

[82] Smith, J., in Terry v. Jewett, 17 Hun, 395 (1879):

"The only other question that need be adverted to relates to the damages. The deceased was about 31 years of age, and had accumulated some property. She was unmarried, and the plaintiff was her father. The defendant's counsel asked the court to charge that in estimating damages the jury might consider the fact that the plaintiff, as next of kin, would be entitled to the property of the deceased by reason of her death. The court refused, and charged that the plaintiff could only recover for the pecuniary injury that he had sustained by the death of the intestate. The request was but little less than asking the court to charge that the defendant, having benefited the plaintiff by killing his daughter and thus putting him in possession of her estate, is entitled to compensation for the service, in the shape of a reduction of the damages given by the statute. The request was properly refused."

See, also, San Antonio & A. P. Ry. v. Long, post, p. 496. That there is no reduction of damages by reason of a benefit conferred by a third party, see, also, Elmer v. Fessenden, 154 Mass. 427, 28 N. E. 299 (1891).

[83] Part of the opinion is omitted.

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of the meadow not taken, bordering on the overflowed land, is benefited, or if the property is directly made more available for practical and advantageous use and enjoyment by the improvement. Mills, Em. Dom. (2d Ed.) § 152 et seq. But remote or speculative benefits, in anticipation of a rise in property for townsite purposes, or, generally, by reason of the proposed improvement of a water power and the erection of mills in the vicinity, cannot be considered. * * *

III. INTEREST.

REID v. RENSSELAER GLASS FACTORY.

(Supreme Court of New York, 1824. 3 Cow. 393.)

Reid was agent of the defendants from June 2, 1812, to the time of his death in August, 1821. This action was on an account current; the credits in favor of Reid being for sums advanced by him for the purpose of keeping the factory in operation. There was also a charge for the intestate's salary as agent from May 1, 1813, to November 1, 1815.

SAVAGE, C. J.[84] * * * It was contended on the argument that interest is not recoverable on an unliquidated account for moneys, unless there be an agreement to pay interest, express or implied, or a fraudulent detention or vexatious delay, and that the case under consideration comes within that principle. A review of some the cases on this subject may be of use.

The oldest case cited is that of Sweatland v. Squire, 2 Salk. 623 (A. D. 1699), where it was said by Powell, J., that interest is recovered by way of damages, when damages are recovered ratione detentionis debiti, but not when damages only are recovered; for interest is not recovered occasione damnorum. In Attorney General v. Brewer's Company, 1 P. Wms. 376 (A. D. 1717), the defendants were trustees of a charity, and by improving the trust estate, had brought the charity in debt. On rendering an account, Lord Cowper refused to allow interest before the confirmation of the master's report; for, until then, it was not a liquidated sum. In Harris v. Benson, 2 Str. 910 (A. D. 1732), the Chief Justice said interest had never been allowed for money lent, without a note. In Robinson v. Bland, Burr. 1085 (A. D. 1760), it was decided that interest was recoverable on money lent, from the time when it was agreed to be paid. In Borret v. Goodere, 1 Dick. 428 (A. D. 1769), Lord Camden said there is no instance where interest is given on an open mutual account, without some particular circumstances. That was a case of cash advances, as appears from a full report of it in 6 Br. P. C. 364. Blaney v.

[84] Part of the opinion is omitted, and the statement of facts is rewritten.

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Hendricks, 2 Bl. 761 (A. D. 1770), allowed interest on an account stated; and the judges remarked that it was properly allowable on money lent. In Trelawney v. Thomas, 1 H. Bl. 304 (A. D. 1789), Gould, J., said interest was recoverable on money lent, and that money laid out for the use of another and money lent stood on the same ground in respect to reason, justice and equity, but that no interest should be allowed for work and labor, or goods sold and delivered. Upon the authority of this case, Livermore, in his treatise on Agency (volume 2, p. 17), lays down the rule that an agent who has advanced money for his principal will be entitled to interest from the time of the advance. In Craven v. Tickell, 1 Ves. Jr. 63 (A. D. 1789), Lord Thurlow said money paid to workmen, who were to have been paid by the defendant, was money advanced for him, and that it was the constant practice at Guildhall, either by the contract or in damages, to give interest upon every debt detained. In Walker v. Constable, 1 B. & P. 307 (A. D. 1798), the court were of opinion that, in an action for money had and received, no interest could be recovered. In Mountford v. Willes, 2 B. & P. 337 (A. D. 1800), interest was allowed on goods sold, after the term of credit agreed on had expired. In Tappenden v. Randall, 2 B. & P. 471 (A. D. 1801), the rule, as previously laid down in Walker v. Constable, was adhered to; and Moses v. McFarlan, 2 Burr. 1005, was cited, where it was incidentally said that the plaintiff can recover no more than the money retained by the defendant against conscience. In De Haviland v. Bowerbank, 1 Campb. 50 (A. D. 1807), Lord Ellenborough said, where money of the plaintiff had come to the hands of the defendant, interest ought not to be recovered, without an agreement, or something from which an agreement might be inferred, or proof that the money had been used. In De Bernales v. Fuller, 2 Campb. 426 (A. D. 1810), he adhered to the same rule, and the whole Court of King's Bench concurred, that the money should not draw interest even after a demand of payment; and afterwards, in Calton v. Bragg, 15 East, 223 (A. D. 1812), the same judge said that Lord Mansfield had sat in the King's Bench for upwards of 30 years, and Lord Kenyon for more than 13 years; that he had been there above 9 years; and during all that time no case had occurred where interest had been allowed upon money lent, without an agreement for it, or for the payment of the principal, at a certain time, or under special circumstances, from which a contract might be inferred.

In Rapelie v. Emory, 1 Dall. (Pa.) 349, 1 L. Ed. 170 (A. D. 1788), it was ruled, by Shippen, President, that when one man has received the money of another, and retains it without his consent, it is to be considered in the same light as money lent, and should carry interest. In Crawford v. Willing, 4 Dall. (Pa.) 289, 1 L. Ed. 836 (A. D. 1803), Smith, J., said: "Whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement, upon the subject of interest, to the honest and rational rule that wher-

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ever one man retains the money of another, against his declared will, the legal compensation for the use of money shall be charged and allowed, and that, in the case of goods sold, interest should be allowed after the time of credit had elapsed, and demand of payment was made. In Lessee of Dilworth v. Sinderling, 1 Bin. (Pa.) 494, 2 Am. Dec. 469 (A. D. 1808), Tilghman, C. J., declared the law to be settled that interest is recoverable on an account for money lent and advanced; and it was allowed to a trustee, upon advances laid out in improvements upon the trust estate, it appearing that the improvements were necessary and proper. In Commonwealth v. Crevor, 3 Bin. (Pa.) 123 (A. D. 1810), he says it is settled that interest shall be recovered against a man who receives the money of another and holds it against his consent. In Brown v. Campbell, 1 Serg. & Rawle (Pa.) 179 (A. D. 1814), he again says the rule is to allow interest where the defendant has retained the money of the plaintiff unlawfully and against his consent: that, until the defendant was informed that the plaintiff's money was applied to his use, he was in no default, and, therefore, ought not to pay interest; but, being informed, he became a wrongdoer in withholding payment, and, therefore, should pay interest.

In Wood v. Robbins, 11 Mass. 504, 6 Am. Dec. 182 (A. D. 1814), the defendant had fraudulently obtained possession of the plaintiff's money; and Putnam, J., after reviewing most of the authorities, says there may be cases where interest should not be allowed, as where the defendant was a mere stockholder, ready to pay the money to the party entitled; but when the defendant has fraudulently obtained the money, or wrongfully detained it, he must be charged with interest. In Winthrop v. Carleton, 12 Mass. 4 (A. D. 1815), the plaintiff, as consignee, made necessary advances, and recovered interest on them after suit brought.

In Connecticut, as appears by Selleck v. French, 1 Conn. 32, 35, 6 Am. Dec. 185, per Swift, J. (A. D. 1814), interest is allowed on the ground of a contract expressed or implied, or as damages for the breach of a contract, or the violation of some duty; e. g. (1) upon an express contract; (2) upon an implied contract, arising from usage of trade, or former dealings between the parties; (3) upon a written contract to pay at a day certain, as on bills and notes, and on a policy after the money becomes due; (4) for goods sold, after the time of credit has expired; (5) for money received to the use of another, and retained contrary to duty; (6) for money obtained fraudulently, if the tort is waived, and assumpsit brought; (7) on a liquidated account; (8) on book account for services performed or articles sold, when, from the nature of the transaction, it appears not to be the intention of the parties that the services or articles were to rest on the footing of a mutual account on book; (9) but where there are mutual accounts, founded on mutual dealings, unless there be some promise or usage to pay interest, it will not be allowed. In such cases, no time of payment is stipulated, each party is making payment, the balance

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is constantly changing, and the presumption is that no interest is to be charged. In the case then before the court, interest was allowed; there were no mutual dealings; the advances were all on the part of the plaintiff; there was no liquidated account, nor promise, nor usage; but the debt was due, and payment unreasonably delayed. * * *

In Campbell v. Mesier, 6 John. Ch. (N. Y.) 24 (A. D. 1822), Chancellor Kent says: "It is the settled rule, in the law of this state, that money received or advanced for the use of another carries interest after a default in payment; and it is a very reasonable and just rule."

From an examination of these cases, it seems that interest is allowed: (1) Upon a special agreement; (2) upon an implied promise to pay it, and this may arise from usage between the parties, or usage of a particular trade; (3) where money is withheld against the will of the owner; (4) by way of punishment for any illegal conversion or use of another's property; (5) upon advances of cash, on the authority of Liotard v. Graves, 3 Caines (N. Y.) 226. * * *

I think, therefore, that interest is properly chargeable on the moneys advanced from the time of such advances respectively to the time when there was an attempt by the defendants to liquidate and settle the account.

As to the compensation for Reid's services, no sum was ever agreed upon between the parties; and his claim for these was never liquidated till it was done by the referees. Interest ought not, therefore, to be allowed on his salary. * * *[85]

WHITE et al. v. MILLER et al.

(Court of Appeals of New York, 1879. 78 N. Y. 393, 34 Am. Rep. 544.)

EARL, J.[86] This is an action to recover damages for a breach of warranty in the sale of cabbage seeds. The warranty, as alleged and found, is that the seeds were Bristol cabbage seeds; and it was found that they were not, and that they did not produce Bristol cabbages. The rule of damages, as laid down by the trial judge in his charge to the jury, was in conformity with the decision of this court when the case was here upon a prior appeal (71 N. Y. 118, 27 Am. Rep. 13,), the difference in value between the crop actually raised from the seed sown and a crop of Bristol cabbage, such as would ordinarily have

[85] Lord Mansfield, in Robinson v. Bland, 2 Burr. 1077 (1760):
"Where money is made payable by agreement between parties, and a time given for the payment of it, this is a contract to pay the money at the given time, and to pay interest for it from the given day in case of failure of payment at that day; so that the action in effect is brought to obtain a specific performance of the contract."
See, also, Dodge v. Perkins, 9 Pick. (Mass.) 368 (1830); Wood v. Robbins, 11 Mass. 504, 6 Am. Dec. 182 (1814); Boyd v. Gilchrist, 15 Ala. 849 (1849); Christie v. I. L. Ins. Co., 111 Iowa, 177, 82 N. W. 499 (1900).

[86] Part of the opinion is omitted.

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been produced that year. The judge also charged the jury that if they found for the plaintiffs, they should also allow them interest upon the amount of damage from the commencement of the suit, April 15, 1869, to the day of their verdict, May 30, 1878. The jury found the damage to be $2,000, and the interest upon this sum to be $1,277.49, and gave plaintiffs a verdict for the amount of the two sums. The defendants excepted to the charge as to interest, and this exception presents the only question for our consideration.

The law in this state as to the allowance of interest in common-law actions is in a very unsatisfactory condition. The decisions upon the subject are so contradictory and irreconcilable that no certain rule for guidance in all cases can be deduced from them.

The common-law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade. Mayne, Dam. (2d Ed.) 105; Higgins v. Sargent, 2 Barn. & C. 349. In the absence of these conditions, interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated, or for goods sold, even though to be paid for on a particular day, or for work and labor. Gordon v. Swan, 12 East, 419. * * *

Thus the law remained in England until St. 3 & 4 Wm. IV, which provides that upon all debts or sums certain, and in actions of trover and trespass de bonis asportatis, and in actions upon policies of insurance, the jury may in their discretion allow interest as part of the recovery.

We have no statute in this state regulating the allowance of interest in such cases. The rule early adopted here upon the subject was more liberal than that adopted in England. The allowance of interest was at first mainly confined to cases coming within the common-law rule as above defined, and to actions to recover money wrongfully detained by the defendant. The rule was then extended so as to allow interest upon the value of property unjustly detained or wrongfully taken or converted, and for goods sold and delivered, and for work and labor; and thus, by a sort of judicial legislation, the allowance of interest, as a legal right, was carried much further here than the scope of the English statute, where the allowance was placed simply in the discretion of the jury. At first the allowance of interest in actions of trover and trespass de bonis asportatis was in the discretion of the jury. Now it is held to be matter of legal right. Down to a recent period interest was not allowed upon unliquidated accounts or demands. Now that last landmark has been swept away, and the sole fact that a demand has not been liquidated is not a bar to the absolute legal right to interest.

A reference to a few recent decisions will show the present state, or as I might with propriety say, the uncertain state of the law upon the subject.

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In Van Rensselaer v. Jewett, 2 N. Y. 135, 51 Am. Dec. 275, the action was to recover rent payable in produce and work; and it was held that the plaintiff was entitled to recover interest from the time the rent fell due. It was admitted by Judge Bronson, writing the opinion, that the damages were unliquidated, and that there was no agreement for interest. He however laid down the general rule thus: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, he is chargeable with interest, from the time of default, on the specified amount of money, or the value of the property or services, at the time they should have been paid or rendered. In Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130, the action was on a contract to recover damages for the nondelivery of merchandise; and it was held that the plaintiff was entitled to recover not only the difference between the contract price and the market value, but also the interest on such difference, and that the allowance of interest did not rest in the discretion of the jury. In McMahon v. Railroad Co., 20 N. Y. 463, it was held that interest could be allowed upon an unliquidated disputed claim for work under a contract for the construction of a railroad. The allowance was based upon the curious ground that the debtor was in default for not having taken the requisite steps to ascertain the amount of the debt. In this case, Judge Selden, speaking of the case of Van Rensselaer v. Jewett, said that that case went a step further in the allowance of interest than the prior cases, "and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market-values; because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay." In Adams v. Bank, 36 N. Y. 255, and Mygatt v. Wilcox, 45 N. Y. 306, 6 Am. Rep. 90, it was held that interest could be recovered in an action by an attorney upon his account for services. * * *

The right of recovery was based upon the theory that there was default in paying money due. In both cases the account appears to have been substantially liquidated, the liability to pay alone being litigated. In Smith v. Velie, 60 N. Y. 106, the action was to recover for services as housekeeper for defendant's intestate during many years. The plaintiff had from time to time received money and goods to apply upon her account. There was no agreement as to the measure of compensation, and it was held that the account was unliquidated, and that interest was not recoverable, even from the death of the intestate, as there was not a fixed market-value by which the rate of wages could be determined. In McCollum v. Seward, 62 N. Y. 316, the action was upon an unliquidated disputed claim for work and labor, and the referee allowed interest from the commencement of the action; and this upon the appeal of the defendant, was held not to be erroneous. * * *

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Upon the prior trial of this action, interest was allowed from the time a crop could have been harvested and sold, if the seed had been as warranted. This was held by this court to have been erroneous, on the ground that "the demand was unliquidated and the amount could not be determined by computation simply or reference to market values."

This brief presentation of decided cases shows how difficult it is to deduce from them any certain rule as to the allowance of interest. A statute could probably be framed which would produce more certain if not juster results. But it must be seen that to uphold this judgment, the rule as to the allowance of interest must be carried at least one step further than it has ever yet been carried; and we are unwilling that the step should be taken in this case.

After a very thorough examination of the cases in England and this country, I have not been able to find one prior to this one, in which it has been held that in a case where the claim was such as not to draw interest from an earlier date, interest could be allowed from the commencement of the action, unless the claim was such that the interest could be set running by a demand, the commencing of the action in such case being a sufficient demand.

In Feeter v. Heath, 11 Wend. 479, the action was to recover for work, labor and materials. There was no dispute as to the amount of plaintiff's claim; the only dispute was whether the defendant was personally responsible for the same. The agreement was to pay the plaintiff upon performance of his contract; and the court held that he was entitled to interest at least from the commencement of the action, as that was a legal demand of payment. * * *

In Barnard v. Bartholomew, 22 Pick. (Mass.) 291, the action was to recover a balance of account for money and professional services; and it was held that "interest is to be allowed where there is an express promise to pay it, or where there is a usage proved from which the jury may infer a promise to pay; and also it may be given as damages for the detention of a debt after the time when due by the terms of the agreement, or for neglect to pay a debt after a special demand." In Amee v. Wilson, 22 Me. 116, the action was upon an account for goods sold and delivered; and it was held that the plaintiff would be entitled to interest prior to the commencement of the suit, "by proof of an agreement to pay it, or by proof of a demand of payment, anterior to the date of the writ."

The cases last cited tend to show that where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date. But there is no authority for holding in a case like this, where the claim sounds purely in damages, is unliquidated and contested, and the

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amount so uncertain that a demand cannot set the interest running, that it can be set running by the commencement of the action. Why should the commencement of an action have such effect? The claim is no less unliquidated, contested and uncertain. The debtor is no more able to ascertain how much he is to pay. No new element is added. The conditions are not changed, except that the disputed claim has been put in suit; and there is no more reason or equity in allowing interest from that than from an earlier date. If interest as a legal right can be allowed in this case from the commencement of the action, then it must be allowed from the same date in all actions ex contractu, and logically it would be impossible to refuse it in actions ex delicto. * * *

WILSON v. CITY OF TROY.

(Court of Appeals of New York, 1892. 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817.)

O'BRIEN, J.[87] * * * On the night of the 13th of November, 1879, a valuable horse belonging to one Learned, plaintiff's assignor, while being driven through South street in the city of Troy, fell into an open ditch or unguarded excavation, made during that day, and was permanently injured. * * * The exception presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property in consequence of the injury from the time that the cause of action accrued. * * *

The tendency of courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state, which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court, and principles stated that will furnish a guide in most cases. White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544. We are concerned now only with the rule ap-

[87] Part of the opinion is omitted.

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plicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass de bonis asportatis, was given first in England by St. 3 & 4 Wm. IV. The recovery was not, however, allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases. * * *

The principle that the right to interest in such cases was in the discretion of the jury, was, however, gradually abandoned, and now the rule is that the plaintiff is entitled to interest on the value of the property converted or lost to the owner by a trespass as matter of law. The reason given for this rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages is not any more in the discretion of the jury than the value. * * *

It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. Thomas v. Weed, 14 Johns. 255. We think the rule is now settled in this state that, where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. * * *

There is a class of actions sounding in tort, in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc.; and still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous. * * *

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THOMPSON v. BOSTON & M. RAILROAD.

(Supreme Court of New Hampshire, 1879. 58 N. H. 524.)

Case, for damages by fire from the defendants' engine. Plea, the general issue. Before suit, the defendants' superintendent told the plaintiff he would pay him $400 for the damages. The plaintiff refused to accept that sum, claiming $600. No formal tender was made or pleaded. The court instructed the jury, that if the plaintiff's damage was not more than $400, and if his refusal to accept that sum prevented its being paid, he was not entitled to interest. Verdict for the plaintiff for $375. Motion by the plaintiff for a new trial.

BINGHAM, J.[88] It is familiar law in this state that interest may be recovered (1) when it is a legal claim, based upon the agreement of the parties, that the court is bound to allow; (2) when it may be allowed by a jury in the nature of damages, as where money is detained after the agreed time of payment; (3) when it is due upon an open account, after demand, or after the commencement of a suit, which for some purposes is regarded as a demand. McIlvaine v. Wilkins, 12 N. H. 474, 480, 482; National Lancers v. Lovering, 30 N. H. 511.

A ground upon which the jury is allowed in the instances named, to give interest as damages, is stated by Lord Mansfield, in Eddowes v. Hopkins, Douglass, 376, to be "long delay, under vexatious and oppressive circumstances."

In actions of trespass and trover for personal property, the damages being unliquidated, the ordinary rule of damages is the value of the property at the time of the taking or conversion, with interest. Felton v. Fuller, 35 N. H. 226, 229; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

The reason for allowing the jury to add interest is more satisfactory in cases of liquidated than unliquidated damages. In the first it is for the detention of money due, while in the latter it is the theory of the law that nothing is due till the damages are liquidated. Still an analogy exists between the two, in this, that the right to recover unliquidated damages accrues at the time the injury is done, and the damages are assessed for the injury as then received; and if the wrongdoer causes long and vexatious delay, and the jury cannot add interest as damages for the delay, as is done in cases of liquidated damages, injustice is the result.

The question of damages was submitted to the jury in this case. They were instructed that if they found certain facts, they would not allow interest; otherwise, they might. The instructions were, in substance, that if the defendant did not occasion the delay, but did all that was required to make amends without delay, and the fault was that of the plaintiff, he would not be entitled to interest as damages.

[88] Part of the opinion is omitted.

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This is the rule in this state in cases of liquidated damages. If the detention occurs through the fault of the creditor, and not that of the debtor, no interest is allowed. Heywood v. Hartshorn, 55 N. H. 476; Otis v. Barton, 10 N. H. 433; Goff v. Rehoboth, 2 Cush. (Mass.) 475; Bank v. Bank, 5 Pick. (Mass.) 106.

We think that in actions of tort the same rule may generally be applied, and that ordinarily the right to interest may be made to depend upon the cause of the delay, as was done in this case. * * *[89]

JACKSONVILLE, ETC., RY. CO. v. PENINSULAR, ETC., CO.

(Supreme Court of Florida, 1891. 27 Fla. 1, 9 South. 661, 17 L. R. A. 33.)

See ante, p. 349, for a report of the case.

LOUISVILLE & N. R. CO. v. WALLACE.

(Supreme Court of Tennessee, 1891. 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.)

SNODGRASS, J.[90] The defendant in error, while in the service of the Louisville & Nashville Railroad Company as brakeman, sustained severe personal injury, resulting in the loss of a leg, which he alleged was occasioned by the negligence of the company. He sued for $15,000 damages. * * * The court told the jury it could assess plaintiff's damages with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at $7,000, with 7 years' interest, $2,940, aggregating $9,940. * * *

The rule for determining damages for injuries not resulting in death (where the statute fixes the measure), and not calling for exemplary punishment, deducible from the decisions of this court since its organization in this state, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind, or person thereby occasioned. And this is the rule most consonant to reason adopted in other states. 3 Sedg. Dam. (8th Ed.) § 481 et seq.; 5 Amer. & Eng. Enc. Law, pp. 40–44, and notes; Railroad Co. v. Read, 87 Am. Dec. 260. As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability to date of judgment, and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be sup-

[89] See, also, Mansfield v. N. Y. C. & H. R. R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566 (1889); Frazer v. Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620 (1886); Penn. R. Co. v. Ziemer, 124 Pa. 571, 17 Atl. 187 (1889).

[90] Part of the opinion is omitted.

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plemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing suffering and disability, just as, when given late, it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due, and the gross sum then for the first time judicially ascertained.

The error of the court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion or other unlawful or fraudulent misappropriation, or detention of property or money, in which the rule applied by the circuit judge is held to be a proper one; not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give as damages an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted, and is not susceptible of definite and accurate computation. It never creates a debt, nor becomes one, until it is judicially ascertained and determined. Only from that time can it draw interest; and interest as damages cannot at any preceding time be added to it without changing and superadding a new element, never given in this state or any other in a similar case, so far as our investigation has discovered. * * *

In this connection we quote section 320 of Sedgwick on Damages: "It sufficiently appears, from what has already been said, that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such actions as assault and battery, or for personal injury by negligence, libel, slander, seduction," etc. The measure of damage in such case seems nowhere to include this or be based upon this idea. Even in respect to injury or destruction of property, where the Supreme Court of the United States has adopted fully the prevailing rule allowing damages in the form of interest on value of the property, the rule has been limited to

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such injury of property or property right as had a fixed or certain value; and it is accordingly held in that court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. Tilghman v. Proctor, 125 U. S. 161, 8 Sup. Ct. 894, 31 L. Ed. 664. * * *

The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent and only to the extent of the injury. The circuit judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff, if he elects to do so. In that event the plaintiff is entitled to a judgment for $7,000, with interest from date of its rendition, and costs, and with this modification the judgment will be affirmed. * * *

BETHEL v. SALEM IMPROVEMENT CO.

(Supreme Court of Appeals of Virginia, 1896. 93 Va. 354, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808.)

See post, p. 593, for a report of the case.

BREWSTER v. WAKEFIELD.

(Supreme Court of United States, 1859. 22 How. 118, 16 L. Ed. 301.)

TANEY, C. J.[91] This case comes before the court upon appeal from the judgment of the Supreme Court of the territory of Minnesota, before its admission into the Union as a state.

It appears that a suit was instituted in the district court, in the county of Ramsey, by Wakefield, the appellee, against the appellant and others, in order to foreclose a mortgage made by the said Brewster and his wife, of certain lands, to secure the payment of three promissory notes mentioned in the proceedings. The notes are not set out in full in the transcript, but are stated by the complainant in his petition, or bill of complaint, to have been all given by Brewster on the 11th of July, 1854, whereby, in one of them, he promised to pay, twelve months after the date thereof, to the order of Wakefield, the appellee, the sum of five thousand five hundred and eighty-three dollars and twenty-five cents, with interest thereon at the rate of twenty per cent. per annum from the date thereof, for value received; and in another, promised to pay to the order of the said Wakefield the further sum of two thousand dollars, twelve months after the date thereof, with interest thereon at the rate of two per cent. per month from the date. * * *

[91] Part of the opinion is omitted.

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There is no question as to the validity of the notes or mortgage; and it is admitted that no part of the debt has been paid. The question in controversy between the parties is, whether, after the day specified for the payment of the notes, the interest is to be calculated at the rates therein mentioned, or according to the rate established by law, when there is no written contract on the subject between the parties. The question depends upon the construction of a statute of the territory (Rev. St. 1851, c. 35), which is in the following words:

"Section 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

"Sec. 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate."

Now, the notes which formed the written contracts between the parties, as we have already said, are not set out in full in the record. We must take them, therefore, as they are described by the complainant, as his description is not disputed by the appellant; and, according to that statement, the written stipulation as to interest, is interest from the date to the day specified for the payment. There is no stipulation in relation to interest, after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether on contract, and was not given by law in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment.

The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law, where there was no contract to regulate it. * * *

HAND v. ARMSTRONG.

(Supreme Court of Iowa, 1865. 18 Iowa, 324.)

LOWE, J.[92] The action is founded upon the following note: "March 1st, 1863. One year after date, I promise to pay to John Hand two thousand dollars, with interest at ten per cent. per annum. [Signed] William Armstrong." The defense set up was that of payment in full of the principal and the interest due thereon.

At the trial it was shown and admitted that on the 1st day of March, 1865, the defendant paid plaintiff $2,320, which covered the principal and ten per cent. interest thereon for the first year, and six per cent. interest for the second year. The court held that the defense was

[92] Part of the opinion is omitted.

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sustained, construing the note to draw ten per cent. interest from its date to its maturity, and only six per cent. thereafter, against the objection of the plaintiff, who insisted that the true construction of the contract would give him ten per cent. thereon until the same was paid, which would entitle him to $88 at the time the cause was tried, in addition to the above payment of $2,320. Our attention is invited to the following cases of authorities, supporting the ruling below: Macomber v. Dunham, 8 Wend. (N. Y.) 550; United States Bank v. Chapin, 9 Id. 471; Ludwick v. Huntzinger, 5 Watts & S. (Pa.) 51–60; Kitchen v. Branch Bank of Mobile, 14 Ala. 233; Brewster v. Wakefield, 22 How. 118, 16 L. Ed. 301.

This last reference is, perhaps, the most pointed and authoritative of the list, and places the decision upon the general ground that, when the rate of interest reserved in the note is higher than that fixed by law, the stipulation to pay the higher rate, from motives of public policy, should not be construed to extend any further than the period designated in the contract for the payment of the debt or principal; in other words, that the conventional interest agreed upon between the parties, being other than the legal interest regulated by statute, should be, and is, qualified and limited by the particular time therein specified for its payment, unless there was something expressed upon the face of the note showing a different intention, namely, that the agreed rate of interest was to continue until the principal debt was paid, etc. Now, whilst this reasoning possesses the semblance of truth, and its force is sensibly felt by us, we nevertheless cannot overlook the circumstances under which the note in question was given, and which, we think, indicate but too clearly the intention of the parties to extend the stipulation for interest beyond the time specified for the maturity of the note. It seems to us like other contracts; if it is ambiguous upon the point in question, the intention of the parties should have much weight in its construction. In agreeing upon a rate of interest different from the legal interest established by law, what did the parties, under the circumstances, contemplate? That the conventional interest should cease at the maturity, or when the note should be paid? We conclude, without much doubt, that it must have been the latter, for the reasons: First. That, inasmuch as the object of the stipulated interest was obviously to pay for the use or forbearance of the money, the natural import or construction of the contract would be, that, as long as its use was granted on the one hand, and the payment thereof delayed on the other, the agreed rate of interest should run. Second. Because such has been the uniform practice and understanding of the courts of this State, so far as we are advised (the question before at least not having been raised in this court), and in the business circles thereof. Third. Because this construction has received a sort of legislative sanction by the act which authorizes the judgment obtained upon this description of contract to draw the same interest expressed upon its face, provided it does not exceed ten per cent.; and that is the

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rate of interest of the note before us. We can hardly conceive that the parties to this instrument intended to make a contract the effect of which, by implication, was to be at variance with the commercial, legislative and judicial construction for nearly a quarter of a century. * * *

BOWMAN v. NEELY.

(Supreme Court of Illinois, 1894. 151 Ill. 37, 37 N. E. 840.)

Neely gave his note to plaintiff's intestate for $3,481.31, payable one year from date, with interest at 10 per cent. from date. This action was brought nearly 12 years after maturity. The instrument also contained the provision that interest was payable annually, and, if not so paid, should become principal and bear interest at the same rate.

BAKER, J.[93] * * * Appellant contends that this provision in the note rendered the contract usurious, and that it was error to allow appellee any interest whatever; that the judgment should have been only for the principal of the note, less the amounts of the several payments indorsed thereon.

In our opinion the case at bar does not come within the purview of section 6, c. 74, Rev. St. 1874. The decisions of this court bearing on this question may be divided into two general classes: First, where a greater rate of interest is sought to be recovered than is allowed by law. This is usury; and in such a case the statute provides that the creditor shall forfeit his interest, and shall recover only the principal of the debt. And, second, where interest upon interest, or compound interest, is sought to be recovered. In that case, if no more than the legal rate of interest is charged, there is no usury, within the meaning of our statute. From motives of public policy, however, the law will not allow the recovery of compound interest. There are but two exceptions to this latter rule: First, in respect to interest-bearing coupons attached to bonds or other securities for the payment of money. Such coupons, when payable to bearer, have, by commercial usage, the legal effect of promissory notes, and possess the attributes of negotiable paper. They are contracts for the payment of a definite sum of money on a day named, and pass, by commercial usage, as negotiable paper. The interest on such bonds, however, is not compounded indefinitely, but is compounded once only. These are the reasons why they are excepted from the operation of the general rule. The second exception is in cases where, the interest having become due, and remaining unpaid, the debtor then agrees to have the accrued interest added to the principal, and become interest bearing. Leonard v. Vil-

[93] Part of the opinion is omitted, and the statement of facts is rewritten.

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lars, 23 Ill. 377; Haworth v. Huling, 87 Ill. 23; Thayer v. Mining Co., 105 Ill. 553; Bank v. Davis, 108 Ill. 633; Gilmore v. Bissell, 124 Ill. 488, 16 N. E. 925; Bowman v. Neely, 137 Ill. 443, 27 N. E. 758.

The case at bar, however, does not come within either of these exceptions to the general rule. Here, the payment of the interest was not secured by a separate and independent instrument, as in the case of coupons attached to bonds, etc., but the payment of the principal and interest was secured by one and the same paper; and the payment of compound interest was here agreed upon in advance, and not after the interest had accrued. Appellee was entitled to recover the principal of the note here in controversy, he making proper deductions for all payments made, together with simple interest from the date thereof, at the rate of 10 per cent. per annum,—the rate contracted for in the note,—that being lawful interest at the time the instrument was executed. * * *

IV. Expenses Incurred.

(A) In Reliance upon Promise.

UNITED STATES v. BEHAN.

(Supreme Court of United States, 1884. 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.)

The claimant averred that the United States government had given him, as bondsman on a contract between the United States and one Roy, the privilege of completing the work under such contract, but that, after he had gone to great expense in providing the necessary machinery, materials, and labor, it was found that the plan of improvement adopted by the government was a failure and he was ordered to cease work. The contract was of the kind to require extensive preparations and large initial expenditures, and contemplated the covering of a portion of the bed of the Mississippi river with artificial cane mats. The claimant seeks to recover such expenditure and the profits which he alleges he could have made if allowed to complete the contract.

Bradley, J.[1] * * * The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely—first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They

[1] Part of the opinion is omitted, and the statement of facts is rewritten.

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may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. * * *

But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in Speed's Case, 8 Wall. 77, 19 L. Ed. 449, and his profits will be measured by "the difference between the cost of doing the work and what he was to receive for it," etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits. When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract. * * *

MASTERTON v. MAYOR, ETC., OF CITY OF BROOKLYN.

(Court of Appeals of New York, 1845. 7 Hill, 61, 42 Am. Dec. 38.)

See ante, p. 241, for a report of the case.

BERNSTEIN v. MEECH.

(Court of Appeals of New York, 1891. 130 N. Y. 354, 29 N. E. 255.)

BRADLEY, J.[2] By contract of date August 4, 1887, between the parties the defendants agreed to furnish to the plaintiff the opera house known as the "Academy of Music" in the city of Buffalo, December

[2] Part of the opinion is omitted.

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22d, 23d, and 24th, for four performances by Jarbeau Comedy Company, and for that purpose the plaintiff agreed to furnish the services of that company during that time, and to take as the consideration 50 per cent. of the gross receipts of all sums realized from the performances. When this contract was executed each of the parties had the right to assume that the other would observe its stipulations. The performances did not take place; and the reason why they did not the plaintiff charges was attributable to the breach of the contract by the defendants. The purpose of this action was to recover damages as the consequence. * * *

The remaining questions have relation to the damages which were the subject of the plaintiff's recovery. The general rule on the subject would permit him, in case of breach by the defendants, to recover the value of his contract. And that was dependent upon the receipts to be realized from the contemplated performances by the plaintiff's company. The results which would in that respect have been produced if the company had been permitted to perform the contract were speculative, and by no probative means ascertainable. It is contended on the part of the defendants that recovery could be founded on no other basis, and therefore the plaintiff could recover nominal damages only. The value of the contract to the plaintiff was in the profits and in the amount of them which may have been realized over his expenses attending its performance. Those profits, not being susceptible of proof, were not the subject of recovery. But by the breach of the contract by the defendants the plaintiff was denied the opportunity which the observance of it could have given him to realize 50 per centum of such receipts as would have been produced by it. His loss also consisted of the expenses by him incurred to prepare and provide for such performance. While the plaintiff was unable to prove the value in profits of his contract, he was properly permitted to recover the amount of such loss as it appeared he had suffered by the defendants' breach. Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718.

The evidence warranted the conclusion that the plaintiff, through his agent, made preparations for the performance of the contract, and that the plaintiff, with his troupe, appeared at Buffalo prepared and in readiness to perform. The amount of his expenses incurred for the purpose of such performance was proved, and they were the basis of the recovery. It is unnecessary to refer specifically to the items of those expenses. The jury were, upon the evidence, permitted to find that to the amount of the recovery they were legitimately incurred for the purposes of the performance of the contract, and that, with a view to such purpose, the plaintiff suffered a loss to that extent. Those expenses may be deemed to have been fairly within contemplation when the contract was made. It cannot be assumed that any part of this loss would have been sustained by the plaintiff if he had been permitted to perform his contract. And assuming, as we must here, that the exclusion of the plaintiff's company from the use of the opera house

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at the time in question was caused by the defendants' breach of the contract, the plaintiff's loss, equal to the amount of his expenses legitimately and essentially incurred for the purpose of its performance, was the consequence of their default, and properly recoverable by him. * * *

HAWLEY v. HODGE.

(Supreme Court of Vermont, 1835. 7 Vt. 237.)

Action of damages in that, although plaintiff and defendant had submitted certain matters in controversy to an arbitrator, the defendant had afterwards revoked the submission. The plaintiff came from the state of New York, over 400 miles, to attend the submission, and had paid his agent and also the arbitrator certain fees for attendance upon one session.

WILLIAMS, C. J.[3] * * * The rule is that where a party revokes he must pay all damages which the other party has sustained. This would, of course, include the cost of the suit discontinued, the costs and expenses which the party had been subjected to in preparing for trial, which he would not have incurred or been subjected to but for the submission, and which he cannot recover in any other way.[4]

(B) In Attempt to Avoid Consequences.

MITCHELL v. BURCH.

(Supreme Court of Indiana, 1871. 36 Ind. 529.)

BUSKIRK, J.[5] * * * It is next insisted that the damages were excessive, for the detention of the nine hogs that were replevied. As we have seen, the jury assessed the plaintiff's damage at twenty-five dollars for the detention of the nine hogs.

The solution of this question will depend upon the elements that enter into and constitute the basis for determining the measure of damages for the detention of personal property, in an action of replevin.

The plaintiff testified as follows:

"I lost two weeks' time hunting hogs; hands were worth one dollar per day; team to plow worth from one dollar and fifty cents to two dollars per day; had to stop the plow while hunting the hogs, as I only had two work horses, and used one to ride."

[3] Part of the opinion is omitted, and the statement of facts is rewritten.

[4] See, also, Pond v. Harris, 113 Mass. 114 (1873); and read, in this connection, Smeed v. Foord, ante, p. 199.

[5] Part of the opinion is omitted.

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An elementary writer states the law thus: "When the property has been delivered to the plaintiff, and the jury find for him, they should assess the damages for the detention, and he is entitled to compensation for any deterioration in the value of the goods replevied, while they were in the hands of the defendant, and also for his time lost and expense incurred in searching for his property, and to the hire of slaves. When the property has not been delivered to him, the jury should also find the value of the property. In this case the damages for detention are usually interest on the value from the time of taking, but in proper cases exemplary damages may be given." Morris, Replevin, 193, 194.

Nelson, C. J., in delivering the opinion of the court in Bennett v. Lockwood, 20 Wend. (N. Y.) 224, 32 Am. Dec. 532, says: "The defendant took the horse and wagon of the plaintiffs wrongfully, and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired them temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiffs in error that the common pleas erred in allowing the plaintiffs to recover for the time spent, and expenses incurred, on the ground that the damages thus claimed were not the natural or necessary consequence of the wrongful taking. Admitting the counsel for the plaintiffs to be right in this proposition, it is no objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration. 1 Chitty's R. 333; Saund. Pl. & Ev. 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to repossess themselves of their property, and were occasioned by the wrongful act of the defendant." * * *

We are of the opinion that the plaintiff was entitled to recover damages for the time necessarily spent and expenses incurred in hunting for his hogs. He does not claim for any time spent or expense incurred after he had ascertained where his hogs were. He would have no right to recover for time spent or expenses incurred after he had ascertained where his property was. It is shown by the evidence by the defendant that he knew that the plaintiff was hunting for his hogs, and did not inform him where they were. We are of the opinion that the hogs of the plaintiff were wrongfully taken away by the defendant, and that he permitted the plaintiff to spend time and money, and delay his plowing in the search for his property, and that it is reasonable and just that he should compensate him in damages therefor. We do not think the amount found by the jury is excessive, upon the facts in the case. * * *[6]

[6] Accord: Bennett v. Lockwood, 20 Wend. (N. Y.) 224, 32 Am. Dec. 532 (1838).

But such expenses cannot be more than what would be reasonable under all the circumstances. Le Blanche v. L. & N. W. Ry., L. R. 1 C. P. Div. 286 (1876).

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HART v. CHARLOTTE, C. & A. R. CO.

(Supreme Court of South Carolina, 1890. 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794.)

SIMPSON, C. J.[7] * * * It seems that the respondent, shortly after his injury, took a trip to the electric wells in Georgia, and also to Glenn Springs in this state, and he was permitted by his honor, the trial judge, to testify, against defendant's objection, as to the expenses incurred on these trips, as part of the damages claimed.

The first two exceptions of defendant allege error to the admission of this testimony, on the ground there was no preliminary, affirmative evidence introduced showing that these trips were a part of any ordinary or usual course of treatment for such injuries as plaintiff had received, and that the expenses incurred therein were reasonable and necessary. Where an alleged wrong is shown to have been the cause of the injury complained of, it is also to be deemed the cause of all of its concomitant and incidental details, which are constituent parts of the injury, including necessary and judicious expenditures made to stay or efface the wrong, or to limit the injury. 1 Suth. Dam. 96. Where a horse was injured, and was sent to a farrier for treatment, it was held that the plaintiff was entitled to recover for the keep of the horse, as well as for the charge of the farrier. Id. 100, 158.

Expenses for surgical and medical aid and nursing when necessary and reasonably incurred, are part of the injury, and may be recovered under proper pleadings. 3 Suth. Dam. 720. There can be no doubt that, if the expenses incurred by the plaintiff here in the matter involved in these exceptions were necessary, reasonable, and judicious expenditures they would be a proper ingredient in the damages of the plaintiff, provided, of course, that the injury intended thereby to be stayed and effaced had been caused by the negligent act of the defendant as alleged. Now, whether such expenditures were reasonable and necessary and judicious was a question of fact. His honor did not undertake to decide this question of fact, but he simply admitted the testimony offered as competent, as bearing upon the amount of said expenditures, leaving the question as to their necessity and reasonableness open to the jury, subject to such further testimony as might be introduced pro and con. * * *

ELLIS v. HILTON.

(Supreme Court of Michigan, 1889. 78 Mich. 150, 43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438.)

See ante, p. 238, for a report of the case.[8]

[7] Part of the opinion is omitted.

[8] See, also, Loeser v. Humphrey, ante, p. 236; Gillett v. Western Railroad Corporation, post, p. 516; Barrick v. Schifferdecker, post, p. 508, note.

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(C) Court Expenses.

DAY v. WOODWORTH.

(Supreme Court of United States, 1851. 13 How. 363, 14 L. Ed. 181.)

See ante, p. 88, for a report of the case.

OELRICHS v. SPAIN.

(Supreme Court of United States, 1872. 15 Wall. 211, 21 L. Ed. 43.)

This was an action brought on an injunction bond conditioned to "pay all damages and costs" which the parties enjoined "shall sustain by the granting of the injunction." The injunction was subsequently dissolved. The court below allowed counsel fees in defending the entire suit as a part of the damages covered by the bonds.

SWAYNE, J.[9] * * * In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions ex delicto vindictive damages may be given by the jury. In regard to that class of cases this court has said: "It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction." Day v. Woodworth et al., 13 How. 370, 371, 14 L. Ed. 181.

The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might pos-

[9] Part of the opinion is omitted, and the statement of facts is rewritten.

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sibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy. * * *[10]

[10] In Noble v. Arnold, 23 Ohio St. 264 (1872), Judge Day said:

"To effect an injunction, section 242 of the Code requires the party obtaining it to give an undertaking, with sureties, 'to secure the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.' The undertaking in this case was given in accordance with and in the language of the statute.

"It is the undoubted privilege of the party to procure a dissolution of an injunction which has been wrongfully obtained. To the extent of the attorney fees and expenses necessarily incurred for that purpose, he is damaged by the injunction. The express undertaking is to pay 'the damages he may sustain by reason of the injunction,' if it ought not to have been granted. Such expenses, then, come within the damages he is entitled to recover upon the undertaking.

"This view is sustained by the weight of authority in the cases where the language of the instrument in suit is similar to that of the undertaking in this case, and in other analogous cases. Edwards v. Bodine, 11 Paige (N. Y.) 223; Corcoran v. Judson, 24 N. Y. 106; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Langworthy v. McKelvey, 25 Iowa, 48; Ah Thale v. Quan Wan, 3 Cal. 216; Prader v. Grim, 13 Cal. 585; Morris v. Price, 2 Blackf. (Ind.) 457; Derry Bank v. Heath, 45 N. H. 524; Ryan v. Anderson, 25 Ill. 372; Garrett v. Logan, 19 Ala. 344.

"But, as already intimated, a distinction is to be taken between expenses incurred only in procuring a dissolution of an injunction, and such as are incurred in the defense of an action, to which the injunction is merely auxiliary and is not essential to the relief sought.

"While, as already stated, we regard the expenses, including reasonable attorney fees, necessarily incurred in procuring a dissolution of an injunction wrongfully granted, as recoverable in an action on the undertaking, when it is finally decided that it ought not to have been granted, we are equally clear that this cannot be done when the expenditure or liability is incurred in defending an action, to which the injunction is only ancillary and not essential to the relief sought by the action; for it could not then be regarded as damage sustained 'by reason of the injunction.'

"The true rule would seem to be, under an undertaking like the one in this case, that where reasonable attorney fees and expenses are necessarily incurred alone in procuring the dissolution of an injunction, when it is the sole relief sought by the action or is merely ancillary thereto, and it is finally decided that it should not have been granted, such fees and expenses may be recovered in an action on the undertaking; but where the injunction is only auxiliary to the object of the action, and the liability is incurred in defeating the action, and the dissolution of the injunction is only incidental to the result, no recovery can be had on the undertaking for the attorney fees and expenses occasioned thereby."

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STRINGFIELD et al. v. HIRSCH et al.

(Supreme Court of Tennessee, 1895. 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733.)

WILKES, J.[11] * * * The first and most important question presented is, are counsel fees proper elements of damage in cases where attachments and injunctions are wrongfully sued out, and impounding orders wrongfully obtained? Upon this question there is an abundance of authority, and an irreconcilable conflict of decisions in the courts of the several states and the federal courts. In High on Injunctions it is held (section 1685) that according to the great weight of authority, reasonable counsel fees incurred in procuring the dissolution of an injunction are a proper element of damages; the amount being limited to the fees paid for procuring the dissolution, and not for the general defense of the case. This holding proceeds upon the idea that the defendant has been compelled to employ counsel to rid himself of an unjust restriction which the plaintiff has placed upon him, and hence such fees will only be allowed when motion is made to dissolve pending the litigation, and before the hearing on the merits. Section 1686. Again, fees will not be allowed to cover the entire expense of the defense, but only for such as was incurred about the injunction. High, Inj. §§ 1688–1690. See, also, 1 Sedg. Dam. § 257; 1 Suth. Dam. § 85; 2 Sedg. Dam. §§ 524, 525; Beach, Inj. §§ 203–210. In these textbooks the principal authorities pro and con are cited and collated. A well-considered case holding the majority view is Cook v. Chapman, 41 N. J. Eq. 152, 2 Atl. 286. This rule thus stated, with minor modifications, is laid down in some 26 states of the Union; among them, the following: Alabama, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Virginia, and West Virginia. In some of these states the matter is regulated by statute, as in Iowa, Mississippi, and Washington. But the rule is held otherwise in Arkansas, Maryland, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, and Vermont, and is settled by neither statute nor decision in Connecticut, Massachusetts, North Dakota, and Rhode Island, so far as we have been able to ascertain. In the United States Supreme Court and in the federal courts, such fees are not allowed. The case of Oelrichs v. Williams, 15 Wall. 211, 21 L. Ed. 43, sets forth the holding of the Supreme Court of the United States in a case very similar to the one at bar. * * *

It is insisted that the cases of Davenport v. Harbert, 1 Leg. Rep. 173, and Oelrichs v. Williams, 15 Wall. 211, 21 L. Ed. 43, are not exactly similar to the case at bar, inasmuch as they do not show that the fees claimed in those cases were properly fees incurred about the injunc-

[11] Part of the opinion is omitted.

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tions alone, and not in the general defense of the cases, and this criticism is just, so far as we can see, from the meager reports of these cases; but at last the question, if not settled by these cases on analogies, is one of broad public policy, and should be settled in accordance with the general trend of our decisions in similar cases, and with the wisest public policy. It is difficult to see upon what ground counsel fees incurred by the adverse party should be charged up to the defeated party any more in attachment and injunction cases than in other litigations, upon contracts or for damages for torts. The litigation may be equally unjust and oppressive in other cases as in the case of attachments and injunctions. It is true, the latter cases are in some respects more summary, and may entail damages arising out of the seizure of defendant's property, but all this is provided for by the terms of the bond required to cover damages sustained. But counsel fees are as necessary in the one class of cases as in the other, and are neither peculiar nor more onerous in cases of attachments and injunctions than in other cases. It is said that additional fees are required to remove the attachment and injunction, and relieve from the impounding orders; but this is more imaginary than real, as the attention necessary to protect and guard against the injunction or attachment is in a vast majority, if not all, of the cases merely incidental to the defense upon the merits, and it is practically impossible to distinguish between services rendered about the attachment or injunction, and those about the defense of the case generally. Any apportionment of the fees between these different services is more or less arbitrary and fanciful. But, if it were otherwise, it is at least but counsel fees of the opposite party which his adversary is called upon to pay.

It is said that in attachment and injunction cases a bond is required, the conditions of which are to pay all such damages as occur by the wrongful suing out of the writs, and that this creates, virtually, a contract on the part of the defendant to pay such damages. But we think that this is a mistaken view of the office and reason of the bond. The liability for damages for wrongfully suing would be the same, so far as the principal in the bond is concerned, whether the bond were executed or not; and the office of the bond is not to create or regulate the liability of the principal, but to bring in the bondsmen, as the securities of the principal, to answer for such damages as are proper. While the liability of the sureties arises out of the execution and condition of the bond, the liability of the principal in no wise depends upon the bond or its conditions. We think that the analogies of the law, as well as the soundest public policy, demand that counsel fees in suits upon contracts, or for damages for torts, or upon attachments or injunctions, should not be regarded as a proper element of damages, even where they are capable of being apportioned so as to show the amount incurred for the attachments and injunctions as separate and distinct from the other services necessary in the case. It is not sound public policy to place a penalty on the right to litigate; that the de-

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feated party must pay the fees of counsel for his successful opponent in any case, and especially since it throws wide the doors of temptation for the opposing party and his counsel to swell the fees to undue proportions, and, in cases of attachment and injunction, to apportion them arbitrarily between the fees pertaining properly to the attachment and injunction and those relating to the merits of the case. * * *[12]

PHILPOT et al. v. TAYLOR.

(Supreme Court of Illinois, 1874. 75 Ill. 309.)

BREESE, J.[13] This was case, in the superior court of Cook county, by Abner Taylor, against Bryan Philpot and Henry E. Pickett, for falsely pretending to be the agents of plaintiff to sell certain real estate belonging to him, in the city of Chicago, and, under that pretense, entering into a contract with one Merrill to sell the premises to him, which contract they caused to be recorded in the proper office in Cook county, and to enforce which, Merrill filed a bill in chancery against the plaintiff, by means whereof plaintiff was put to great charges and expenses in defending the same, and for attorney's fee on appeal, and for printing abstracts and briefs, to his damage five thousand dollars. * * *

The rule, as found in the text-books, is, that whosoever does an illegal or wrongful act is answerable for all the consequences in the ordinary and natural course of events, though these consequences be directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer; or, provided their acts, causing the damage, were the necessary or legal and natural consequence of the original wrongful act.

Here, Merrill was the intervening agent, who was set in motion by these pretended agents—the appellants, the original and primary

[12] McWhorter, C. J., in Wittich v. O'Neal, 22 Fla. 592 (1886):

"The remaining question is, is a liability for the payment of counsel fees sufficient, or must they have been actually paid? Counsel for appellee cites us to two cases—Packer v. Nevin, 67 N. Y. 550, and Prader v. Grimm, 28 Cal. 11. In the first of these cases this question was not before the court. 'A preliminary injunction was obtained and upon agreement of the parties it was ordered that the question of defendant's damages, if any, sustained by reason of the injunction, be heard and determined, jointly with the issues by the referee. No evidence of damage of any kind was given on the trial, no finding of facts was made by the referee in regard thereto, nor were any requests made to find.' The court said 'that it was not imperative for the referee to make an allowance for counsel fees without proof of payment, or that a liability had been incurred therefor.' The California case cited squarely sustains the position of the appellee, but we think the great weight of authority maintains the principle that a fixed liability is sufficient without actual payment."

See, also, Linsley v. Bushnell, 15 Conn. 225, 38 Am. Dec. 79 (1842); Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Dec. 481 (1881); Howell v. Scoggins, 48 Cal. 355 (1874); Vorse v. Phillips, 37 Iowa, 428 (1873).

[13] Part of the opinion is omitted.

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wrongdoers. Had they not given the contract, there would have been no chancery suit, by Merrill, to compel performance. A case is referred to from 30 Law Journal, Queen's Bench, 137, Dixon v. Fourcoy, where it was held, if the natural result of a wrongful act, committed by a defendant, has been to plunge the plaintiff into a chancery suit, and thereby to cause him to incur costs and expenses, whatever may be the event of the suit, there is that conjunction of wrong and damage which will give the plaintiff good cause of action. * * *

To the same effect is Himes v. Keighblingher, 14 Ill. 469. Here, as in that case, the declaration counts upon a malfeasance, for an affirmative wrongful act. It is for the tortious act of defendants, and to recover for the trouble and expenses necessarily incurred to get rid of the effects of this audacious act. It cannot be said these expenses were not the reasonable result of defendants' conduct. * * *

BAXENDALE et al. v. LONDON, C. & D. RY. CO.

(Court of Exchequer, 1874. L. R. 10 Exch. 35.)

Lord COLERIDGE, C. J. In this case a claim is made against the defendants for the costs incurred by the plaintiffs of an unsuccessful defence offered by them to an action brought against them by one Harding. It appears that the plaintiffs contracted with Harding to send two pictures for him from London to Paris; and that afterwards, by a separate and independent contract, the defendants agreed with the plaintiffs to carry the pictures. In the course of transit, through the defendants' negligence, the pictures fell into the sea and were damaged. Harding thereupon brought an action against the plaintiffs, who took legal advice, and were told, and rightly told, that they had no defence. The plaintiffs communicated this fact to the defendants, and a long correspondence ensued, the substance of which was that the defendants said to the plaintiffs: "Take your own course in Harding's action. We will have nothing to do with it. When the time comes for you to attack us we shall defend ourselves." The plaintiffs, however, persisted in defending Harding's action, and it went to trial. The plaintiffs were defeated, and then commenced this action, in which they sought to recover from the defendants, not only the damages assessed by the jury as the value of the pictures, but also the costs of their unsuccessful defence. The defendants paid the damages for the injury to the pictures into court, and denied any further liability. The Court of Exchequer have decided upon the authority of Mors le Blanch v. Wilson, Law Rep. 8 C. P. 227, that they are liable to those costs, or, at all events, to so much of them as were incurred by the plaintiffs in ascertaining the amount of their liability to Harding, and in relation to the defence of the Carriers Act. I am of opinion that this decision is erroneous. The defence was not in my judg-

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ment, a reasonable defence. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up.

This, however, does not dispose of the whole of the plaintiffs' claim. For it may be said: "True, the defence was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default, upon a writ of inquiry." But I think this contention fails also, because it seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty. The judgment, therefore, must be reversed. It appears to have proceeded wholly upon the case of Mors le Blanch v. Wilson, Law Rep. 8 C. P. 227, which is certainly very like this case, and which, if necessary, should in my opinion be overruled.[14]

[14] Only the opinion of Lord Coleridge, C. J., is here given.

See, also, Fisher v. Val de Travers Asphalt Co., L. R. 1 C. P. Div. 511 (1876), and Hammond v. Bussey, L. R. 20 Q. B. Div. 79 (1887).

Bovill, C. J., in Mors le Blanch v. Wilson, L. R. 8 C. P. 227 (1873), an action brought to recover costs incurred in defending a suit in which the plaintiffs were liable because of the present defendants' default:

"Upon the first point raised in this case, viz., the plaintiffs' right to recover the costs incurred by them in the action brought against them by the owner of the Majestic, it seems to me that the proper question was left to the jury by my Brother Brett, viz., whether it was a reasonable thing for the plaintiffs to defend that action, and whether the defence was conducted in a reasonable manner. This question is constantly arising in a variety of forms. A party is frequently put to considerable difficulty where the action is brought for unliquidated damages. As a general rule, he must not recklessly defend the action, and so heap upon the person eventually liable unnecessary expense. But, on the other hand, if he places all the facts before the person whom he seeks to charge, and that person declines to intervene, and leaves him to take his own course, it surely must be for the jury to say whether it was reasonable to defend, and whether the defence was conducted in a reasonable manner. I do not see what other question could be left; and we have the authority of Parke, B., in Tindall v. Bell, 11 M. & W. 228, at page 231, for saying that it is the only proper question. If, under the circumstances, it would have been more prudent to settle the claim by a compromise, or to pay money into court, or to allow judgment to go by default, that would have afforded topics for observation and comment: but it must at last be left to the jury; the judge could not take upon himself to decide it as a matter of law."

See, also, Broom v. Hall, 7 C. B. (N. S.) 503 (1859); Attorney General v. Tomline, 5 Ch. Div. 750 (1877); Pow v. Davis, 1 Best. & S. 220 (1861); Holloway v. Turner, 6 Q. B. 928 (1845).

Martin, B., in Howard v. Lovegrove, L. R. 6 Exch. 43 (1870), an action against the assignee of a lease upon an agreement to indemnify the lessee against a failure to perform the covenants of the lease, brought to recover costs incurred in an unsuccessful defense by the lessee in a suit brought against him by the lessor:

"It is admitted that the plaintiff ought to recover the costs of the action brought against him by the landlord, and the question is what are these costs? I should say that they include everything which his attorney could recover against him. To give him the mere costs as taxed by the master, who acts according to a particular scale, would not be a complete indemnification. I was of this opinion at the trial, and I see no reason to alter it. It is not, in my opinion, the duty of the judge in such a case to tell the jury that as a

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INHABITANTS OF WESTFIELD v. MAYO.

(Supreme Judicial Court of Massachusetts, 1877. 122 Mass. 100, 23 Am. Rep. 292.)

LORD, J.[15] The remaining question in this case is whether the plaintiff shall recover the amount paid as counsel fees in the suit against the town, which, it is agreed, are reasonable, if in law they are to be allowed. The defendant was notified by the town of the pendency of the original suit, and was requested to defend it, which he declined to do.

The difficulty is not in stating the rule of damages, but in determining whether in the particular case the damages claimed are within the rule. Natural and necessary consequences are subjects of damages; remote, uncertain, and contingent consequences are not. Whether counsel fees are natural and necessary or remote and contingent, in the particular case, we think may be determined upon satisfactory principles; and, as a general rule, when a party is called upon to defend a suit founded upon a wrong, for which he is held responsible in law without misfeasance on his part, but because of the wrongful act of another, against whom he has a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit. When, however, the claim against him is upon his own contract, or for his own misfeasance, though he may have a remedy against another, and the damages recoverable may be the same as the amount of the judgment recovered against himself, counsel fees paid in defense of the suit against himself are not recoverable.

The decision in Reggio v. Braggiotti, 7 Cush. 166, is adverse to the allowance of counsel fees, as falling within the latter class. In that case the plaintiff sold to Henshaw, Ward & Co. an article with a warranty that it was known in commerce as opium, and Henshaw, Ward & Co. recovered damages against the plaintiff upon his warranty. They, having made the warranty, were responsible for damages resulting from the breach of their own contract. The defendant in that case had made a similar warranty to the plaintiffs, and although they were liable to him upon that warranty, it was held that they were not liable for counsel fees paid in defending their own warranty. Although the reasons for that decision, which are very briefly given, are not the same which we now assign in support of it, the decision itself is sustained by the authorities. * * *

Action to recover the amount of a judgment recovered against the town by one Hanchette for injuries sustained by falling over a pile

matter of law they can give nothing beyond the taxed costs. I must add that I think the same reasoning would apply to actions of tort, and I am, therefore, unable to assent to the principle of the decisions which have been cited to us."

[15] Part of the opinion is omitted.

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of brick carelessly placed by defendant Mayo upon the highway in front of his premises.

In Fisher v. Asphalte Co., 1 C. P. Div. 511 * * *, one Hicks sustained an injury by reason of the defective condition of the way, and commenced proceedings against the Metropolitan Tramway Company for damages, and the Metropolitan Tramway Company notified the plaintiff, and the plaintiff notified the defendant. The defendant declined to interfere. The plaintiff, however, took upon himself the defense of the suit against the tramway company, and adjusted it; and the settlement was found to be a reasonable and proper one. In his action against the defendant he contended that his counsel fees incurred in the previous proceedings should be added to the amount paid to Hicks. Brett and Lindley, JJ., in their several opinions, felt themselves bound by the decision in Baxendale v. Railway, L. R. 10 Exch. 35, but thought that, if they were not precluded by that decision they should have great difficulty in refusing to allow counsel fees in addition to the amount paid as damages; but Lord Coleridge, C. J., while holding that that decision was conclusive, was not prepared to say that it was not right in principle. And he uses this very suggestive language: "The tramway company contract with Fisher; Fisher contracts with the defendants; and the claim of Hicks arises from negligence of the latter. Are the defendants to be liable to three sets of costs because the actions may have been reasonably defended? If they are, the consequences may be serious. If not, at which link of the chain are the costs to drop out?"

Following this suggestion, if, in the case of Reggio v. Braggiotti, there had been ten successive sales instead of two, and each with the same implied warranty, and successive suits had been brought by the ten successive purchasers, each against his warrantor, would the first seller be liable for such accumulation of counsel fees upon his contract of warranty? If not, in the pertinent language just quoted, "at which link of the chain are the costs to drop out"? In each of these cases it will be observed that the counsel fees were paid in defending a suit upon the party's own contract.

In the present case the plaintiff was not compelled to incur the counsel fees by reason of any misfeasance or of any contract of its own, but was made immediately liable by reason of the wrongdoing of the defendant. There seems, therefore, to be no ground in principle by which it should be precluded from recovering as part of its damages the expenses reasonably and properly incurred in consequence of the wrongdoing of the defendant. Within this rule a master, who is immediately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant, not only the amount of the judgment recovered against him, but his reasonable expenses, including counsel fees, if notified to defend the suit. It may be said in that case, as in this, that there may be a technical misfeasance, or rather nonfeasance, in not guarding more carefully

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the conduct of the servant, or in watching for obstructions in the street; but no negligence is necessary to be proved in either case as matter of fact; the party is directly liable because of the wrong of another, whatever diligence he may have himself exercised. It does not, however, apply to cases where one is defending his own wrong or his own contract, although another may be responsible to him. * * *

If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit, and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense. And this rule, while consistent with legal principles, is sanctioned by the highest equitable considerations. If the party ultimately liable for his exclusive wrongdoing has notice that an intermediate party is sued for the wrong done by him, it is right, legally and equitably, that he take upon himself at once the defense of his own act, thereby settling the whole matter in a single suit. If he requires the intermediate party to defend, there is no rule of law or of morals which would relieve him from the consequences of his additional neglect of duty. * * *

ROLPH v. CROUCH.

(Court of Exchequer, 1867. L. R. 3 Exch. 44.)

KELLY, C. B.[16] I think this case is free from difficulty. The first question is, as to the right of the plaintiff to recover damages, costs and expenses, incurred by him in defending an action of trespass brought against him by one Cook, who claimed under his landlord, the now defendant. In order to ascertain if the plaintiff is entitled to recover, we must look to the covenant in the lease under which he held the premises, which is as follows: "Newton Crouch doth hereby for himself, his heirs, etc., covenant with Joseph Rolph, his executors, etc., that he the said Joseph Rolph, his executors, etc., paying the rent hereby reserved, and performing the covenants hereinbefore contained, shall and may peacably and quietly have, hold, use, occupy and enjoy, the premises hereby demised, with their appurtenances, during the term hereby granted, without any interruption whatsoever from and by the said Newton Crouch, or his executors, etc., or any other person or persons lawfully claiming by, from, or under him or them." Now, Cook, being a person claiming under the defendant, this covenant secures the plaintiff from interruption by Cook. Then we have next to inquire whether the conduct of Cook caused a breach of this cove-

[16] Part of the opinion is omitted.

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nant. What occurred was, shortly, this: Cook came to the plaintiff, and told him that he had no right or title in the premises, and no power to deal with them in any way; and because the plaintiff had, in fact, dealt with them, Cook commenced an action of trespass against him. The plaintiff set up the best defense he could to the action, but in the result the verdict was against him, and he became liable for the damages and costs of the action. It is contended, that although this conduct on the part of Cook may constitute an interruption to the plaintiff's enjoyment, and therefore may be a breach of the covenant in the lease, yet the now plaintiff had no right to defend the action brought against him by Cook, and to incur the costs he did incur. But, applying our common sense to the matter, how does it stand? The plaintiff was in possession of the premises under a lease containing the defendant's covenant. Then Cook, claiming under the defendant, interrupts his enjoyment. What course was the plaintiff to adopt? He had himself no knowledge whether there was a good title in his landlord, the now defendant, or not. The defendant alone knew that. That being so, the plaintiff gave the defendant notice that the action had been brought, and by that notice, in effect, requested the defendant's direction as to how to act. The defendant, however, remained silent, and left the plaintiff to do as he might think fit. I think it was the defendant's duty to have communicated with the plaintiff, and either to have said, "I have a good title," or else, "I made the lease to you under a mistake. I have no title; you had better not defend the action." The defendant, however, failed to perform that duty, and the plaintiff, accordingly, being left to himself, acted for the best, upon his own judgment. He acted bona fide, and, giving credence to the defendant's warranty that he should quietly enjoy the property. Afterwards, on the trial of the action, it turned out that the defendant, as he must be taken to have known before, had no title to give such a warranty. Under these circumstances, I am of opinion that the plaintiff was justified in the course which he took, and therefore that the damages, costs and expenses which he incurred in the action brought against him by Cook, are the natural and immediate consequence of the defendant's breach of covenant. * * *[17]

[17] See, also, Meservey v. Snell, 94 Iowa, 222, 62 N. W. 767, 58 Am. St. Rep. 391 (1895), and Ryerson v. Chapman, 66 Me. 557 (1877).

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CHAPTER II.

NONPECUNIARY LOSSES.

SECTION 1.—PHYSICAL PAIN.

GOODHART v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1896. 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705.)

WILLIAMS, J.[1] The plaintiff received the injury complained of while a passenger on one of the trains of the defendant company. * * * Damages for a personal injury consist of three principal items: First, the expenses to which the injured person is subjected by reason of the injury complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power if any, and whether temporary or permanent, consequent upon the character of the injury. Owens v. Railway Co., 155 Pa. 334, 26 Atl. 748.

The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with same effect that he may hire other persons, but, in the absence of an express contract, the law will not presume one, so long as the family relation continues.

Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in consideration of suffering necessarily endured. Baker v. Pennsylvania Co., 142 Pa. 503, 21 Atl. 979, 12 L. R. A. 698. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to a pecuniary com-

[1]Part of the opinion is omitted.

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pensation afforded by the first and third items that enter into the amount of the verdict in such cases.

By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of 20 days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be: What is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain, instead of being devoted to labor? Some allowance has been held to be proper; but, in answer to the question, "How much?" the only reply yet made is that it should be reasonable in amount.

Pain cannot be measured in money. It is a circumstance, however, that may be taken into the account in fixing the allowance that should be made to an injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for or made because of the suffering consequent upon the injury. In computing the damages sustained by an injured person, therefore, the calculation may include not only loss of time and loss of earning power, but, in a proper case, an allowance because of suffering.

The third item, the loss of earning power, is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word "earnings" means the fruit or reward of labor; the price of services performed. And. Law Dict. 390. Profits represent the net gain made from an investment, or from the prosecution of some business, after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with

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which one is connected cannot, therefore, be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error.

It was also error to treat this subject of the value of earning power as one to be settled by expert testimony. An expert in banking or merchandizing might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living. * * *

Another subject requires consideration. The verdict rendered by the jury gives the calculation upon which the enormous sum awarded to the plaintiff was based. From this it appears that the sum of $19,526.50 was given as the cost of an annuity of $1,750 per annum for 19 years. This calculation assumes (1) that the plaintiff's earning power was nearly twice as great as he had himself offered it for to the company whose president and manager he was. It assumes (2) that he had a reasonable expectation of life for 19 years, being at the time of the trial about 53 years old. It assumes (3) that his earning power, instead of steadily decreasing with increasing years, would hold up at its maximum to the very end of life. It assumes, in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market, and purchase an annuity now, equal to his estimated earnings.

The first, second, and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums. * * *[2]

[2] Physical pain has always been a compensable element of damage. The subject does not admit, however, of a definite measure of compensation, but the assessment therefor is left to "the good sense and unbiased judgment of the jury." I. C. R. R. Co. v. Barron, 5 Wall. 90, 18 L. Ed. 591 (1866); Aldrich v. Palmer, 24 Cal. 513 (1864); Stafford v. City of Oskaloosa, 64 Iowa, 251, 20 N. W. 174 (1884); P. R. R. Co. v. Allen, 53 Pa. 276 (1867); Phillips v. S. W. R. R. Co., 4 Q. B. Div. 406 (1879), ante, p. 74; Hamlin v. G. N. R. R. Co., 1 Hurl. & N. 408 (1856), ante, p. 64; Ransom v. N. Y. & E. R. R. Co., 15 N. Y. 415 (1857), ante, p. 65.

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SECTION 2.—INCONVENIENCE.

BALTIMORE & P. R. CO. v. FIFTH BAPTIST CHURCH.

(Supreme Court of United States, 1883. 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.)

The plaintiff alleges that the defendant, in 1874, erected an engine house and machine shop on a parcel of land immediately adjoining its church edifice, and has since used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday schools, and destroy the value of the building as a place of public worship. It therefore brought the present suit in the Supreme Court of the district for the damages it had sustained.

FIELD, J.[3] * * * Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday school which assembled there on the Sabbath and on different evenings of the week. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. Crump v. Lambert, L. R. 3 Eq. 409.

The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them, are not affected by their corporate character. * * *

Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below

[3] Part of the opinion is omitted.

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very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure. * * *

TURNER v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington, 1896. 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883.)

The plaintiff and his wife purchased through tickets from St. Paul, Minn., to Spokane, Wash., over the defendant company's road, the latter then knowing that through transportation was impossible over its lines. At Havre, Mont., the plaintiff was directed to leave the train, to proceed to Helena, and then to take the road of the Northern Pacific Railroad Company, which company, the defendant stated, would honor plaintiff's ticket. This it, however, refused to do. Plaintiff was compelled to pay fare, and afterward was delayed at Missoula for 18 days by reason of floods. A verdict was rendered for $750.

ANDERS, J.[4] * * * In answer to the question, "Now, Colonel, I wish you would go on and state to the jury what, if any, anxiety, worriment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court, in consequence of this delay," the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled, and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula, as they did their passengers; his means were limited, and he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick, and lay in bed three days, in consequence of her worriment, and that he could not make her comfortable under the circumstances. Damages for "worriment" and disappointment resulting from such circumstances are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court

[4] Part of the opinion is omitted, and the statement of facts is rewritten.

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therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover, for worry and mental excitement, such sum as would fairly and reasonably compensate him therefor. "Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury." 1 Sedg. Dam. (8th Ed.) § 42. And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. Trigg v. Railway Co., 74 Mo. 147, 41 Am. Rep. 305; Hobbs v. Railway Co., L. R. 10 Q. B. 111; Hamlin v. Railway Co., 1 Hurl. & N. 408; Walsh v. Railway Co., 42 Wis. 23, 24 Am. Rep. 376. * * *

Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sensation in each case, whether it be called excitement, anxiety, annoyance, or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded. * * *[5]

SECTION 3.—MENTAL SUFFERING.

I. CONSEQUENT UPON PHYSICAL INJURY.

SEGER v. TOWN OF BARKHAMSTED.

(Supreme Court of Errors of Connecticut, 1853. 22 Conn. 290.)

The plaintiff's horse stepped into a hole on defendant municipality's bridge, became unmanageable, and because of the lack of a proper railing fell off the bridge, by reason of which the plaintiff sustained personal injuries and his horse and wagon were damaged.

STORRS, J.[6] * * * The remaining question is, whether the judge below was correct in instructing the jury that, in the assessment of damages, they might consider the peril and danger to which the plaintiff was exposed, by the accident which produced the injury complained of. We think that this part of the charge was right. It embraced the peril to the person only of the plaintiff—not to his property. It

[5] See, also, Baltimore & O. R. R. v. Carr, ante, p. 67; Jenson v. C., St. P., M. & O. R. R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680 (1893); D'Orval v. Hunt, Dud. (S. C.) 180 (1838); Hobbs v. L. & S. W. Ry. Co., L. R. 10 Q. B. 111 (1875); Churchill v. Burlington Water Co., 94 Iowa, 89, 62 N. W. 646 (1895).

[6] Part of the opinion is omitted, and the statement of facts is rewritten.

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is not necessary to inquire, whether or how far, in an action like the present, vindictive or punitory damages are allowable. That the plaintiff is entitled to be compensated for his actual personal injury, there is, of course, no question; and that principle is sufficient to vindicate the charge, on this point. Such actual injury is not confined to the wounds and bruises upon his body, but extends to his mental suffering. His mind is no less a part of his person than his body; and the sufferings of the former are oftentimes more acute and also more lasting than those of the latter. Indeed, the sufferings of each, frequently, if not usually, act reciprocally on the other. The dismay, and the consequent shock to the feelings, which is produced by the danger attending a personal injury, not only aggravate it, but are frequently so appalling as to suspend the reason and disable a person from warding it off; and to say, that it does not enter into character and extent of the actual injury, and form a part of it, would be "an affront to common sense." * * *

MEMPHIS & C. R. CO. v. WHITFIELD.

(Supreme Court of Mississippi, 1870. 44 Miss. 466, 7 Am. Rep. 699.)

TARBELL, J.[7] * * * Upon this branch of the case, the inquiry here naturally arises, what are proper subjects of compensation, in cases of injuries to the person, when merely compensatory damages can be allowed? We answer: The jury in estimating the damages, may take into consideration the loss of time and pecuniary expense consequent thereupon, and also the bodily pain, or any incurable hurt. Pierce, 495; Sedg.; Shearman & R.; Morse v. Auburn & Syracuse R. R. Co., 10 Barb. (N. Y.) 621; Curtiss v. Rochester & Syracuse R. R. Co., 20 Barb. (N. Y.) 282.

In an action for negligent injury to the person of the plaintiff, he may recover the expenses of his cure; the value of the time lost by him during the cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money. Shear. & Red. § 606.

The jury may estimate future damages in the way of loss of health, and of time, disability of limbs so as to prevent a party from pursuing his usual employment; bodily pain and suffering, which are proved as reasonably certain to result from the original injury; also, mental suffering may be taken into consideration, where actual injury to the person has been sustained. * * *[8]

[7] Part of the opinion is omitted.

[8] See, also, I. & St. L. Co. v. Stables, 62 Ill. 313 (1872), Tunnicliffe v. Bay City Con. Ry. Co., 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142 (1894), and Bovee v. Danville, 53 Vt. 190 (1880).

Taylor, J., in Heddles v. Chicago & N. W. Ry. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106 (1890), said:

"The first error assigned is the instructions of the court to the jury on the

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II. Antecedent to Physical Injury.

LYNCH v. KNIGHT.

(House of Lords, 1861. 9 H. L. Cas. 577.)

An action by Knight and his wife to recover damages for slanderous words spoken of the wife, imputing lack of chastity on her part prior to marriage. The special damage alleged was loss of consortium by the wife by reason of the speaking of the words. The jury found a verdict for £150. Reversed.

Lord Wensleydale [9] [after holding that the special damage averred was not the proximate consequence of the speaking of the slander]. Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honor and wounded feelings of the parent. * * * [10]

question of damages. The instruction objected to reads as follows: 'The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future, by reason of his injuries; also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows.' The learned counsel for the appellant take exceptions to the use of the words, 'for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows.' It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to."

[9] Part of the opinion is omitted, and the statement of facts is rewritten.

[10] See, also, Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303 (1880).

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ALLSOP v. ALLSOP.

(Court of Exchequer, 1860. 5 Hurl. & N. 534.)

Declaration. That, before the committing of the grievances, the said Hannah was the wife of the plaintiff William Allsop; and the defendant, on divers occasions, falsely and maliciously spoke and published of the plaintiff Hannah the words following (to the effect that he had had carnal connection with her whilst she was the wife of the plaintiff William Allsop): "Whereby the plaintiff Hannah lost the society of her friends and neighbors, and they refused to and did not associate with her as they otherwise would have done, and she was much injured in her credit and reputation, and brought into public scandal and disgrace: and, by reason of the committing of the grievances, the said Hannah became and was ill and unwell for a long time unable to attend to her necessary affairs and business, and the plaintiff William Allsop was put to and incurred much expense in and about the endeavoring to cure her of the illness which she laboured under as aforesaid by reason of the committing of the said grievances; and the said William Allsop lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had."

Demurrer and joinder.[11]

BRAMWELL, B. * * * The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. If it were so I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking of slanderous words. Therefore, on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think that this action will not lie.

[11] Arguments of counsel and all except a part of the opinion of Bramwell, B., are omitted.

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VICTORIAN RYS. COM'RS v. COULTAS.

(House of Lords, 1888. L. R. 13 App. Cas. 222.)

The plaintiffs, James and Mary Coultas, were driving, and, on coming to the track of the railway, found the gates closed. The gateman opened the gate nearest them and they drove upon the track, when they saw an approaching train. James whipped up his horse, so that he managed to get the buggy across and through the farther gate, so that the train did not touch the buggy. It passed very close, however, and Mary Coultas fainted from fright. She suffered a severe illness and her nervous system was greatly shocked. A judgment was rendered in favor of the plaintiffs.

Sir RICHARD COUCH.[12] * * * According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York which he referred to in support of his contention was a case of a palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of Sneesby v. Lancashire & Yorkshire Railway Company, 1 Q. B. D. 42. It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. * * *[13]

[12] Part of the opinion is omitted, and the statement of facts is rewritten.

[13] "Though the bodily injury may have been very small, yet if it was a ground of action, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages."—Metcalf, J., in Canning v. Williamstown, 1 Cush. (Mass.) 451 (1848).

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SLOANE v. SOUTHERN CALIFORNIA RY. CO.

(Supreme Court of California, 1896. 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.)

The plaintiff, Anna L. Sloane, purchased a ticket on the defendant railroad and duly surrendered it to the conductor, who gave her no check in return. She was subsequently put off the car by a second conductor, who demanded a ticket or payment of fare. No personal violence was used toward her, and she left the car by the direction of the second conductor.

HARRISON, J.[14] * * * Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental excitement; and that, by reason of the excitement caused by her exclusion from the car, there had been a recurrence of insomnia and of these paroxysms. * * *

Counsel for the appellant has discussed, in his brief, the want of liability on the part of the defendant for any damages for mental suffering, and has cited many authorities in support of the proposition that mere mental anxiety, unaccompanied with bodily injury or apprehended peril, does not afford a right of action. * * *

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury

[14] Part of the opinion is omitted, and the statement of facts is rewritten.

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is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of Bell v. Railway Co., L. R. 26 Ir. 428. Mrs. Bell was a passenger upon one of the defendant's trains, and by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock, and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that, unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright, such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage for which a recovery might be had, and, referring to the contention of the defendant, said: "It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." At the close of his opinion, Lord Chief Baron Palles says: "In conclusion, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time."

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This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick's treatise on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77–81), also comments upon it with great approval. In Purcell v. Railroad Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: "A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system." * * *

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained. Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. * * *

MITCHELL v. ROCHESTER RY. CO.

(Court of Appeals of New York, 1896. 151 N. Y. 107, 45 N. E. 35, 34 L. R. A. 781, 56 Am. St. Rep. 604.)

MARTIN, J.[15] * * * On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew

[15] Part of the opinion is omitted.

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near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. Lehman v. Railroad Co., 47 Hun, 355; Commissioners v. Coultas, 13 App. Cas. 222; Ewing v. Railway Co., 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709.

The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: Haile v. Railroad Co., 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; Joch v. Dankwardt, 85 Ill. 331; Canning v. Inhabitants of Williamstown, 1 Cush. (Mass.) 451; Telegraph Co. v. Wood, 6 C. C. A. 432, 57 Fed. 471, 21 L. R. A. 706; Renner v. Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654; Allsop v. Allsop, 5 Hurl. & N. 534; Johnson v. Wells, Fargo & Co., 6 Nev. 224, 3 Am. Rep. 245; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences.

Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without

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detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. * * *

WATSON v. DILTS.

(Supreme Court of Iowa, 1902. 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239.)

SHERWIN, J.[16] The petition alleges that the plaintiff is a married woman, and that on the 9th day of February, 1900, she resided, with her husband and child, on a farm remote from the traveled highway; that in the nighttime of said day, at about the hour of 11 o'clock, and after she, her husband, and her child had gone to bed, the defendant wrongfully, surreptitiously, and stealthily entered her said home, and went upstairs to the second story thereof, and, as the plaintiff then believed, to commit a felony; that the identity of the defendant was not known to her at the time she heard him enter the house and go upstairs, and that she called to her husband to follow him, which he did; that in her apprehension for her own, her child's, and her husband's life, from what appeared to her a threatened danger, she followed her husband up to the room where the defendant was found, and where she found him and her husband in what appeared to her to be an encounter, and an assault upon her husband; that she became greatly terrified thereat, and was attacked with a violent nervous chill of such severity that her nervous system completely gave way, and she became prostrated, and was confined to her bed with threatened neurosis, or paralysis, and suffered great mental and physical pain for nearly six weeks, during all of which time she was confined to her

[16] Part of the opinion is omitted.

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bed, and unable to attend to her household duties. The demurrer to the petition is based on the ground that the damages claimed are too remote and speculative, and that the plaintiff seeks recovery for fright and injuries resulting therefrom without any physical injury to her which caused the fright. The petition alleges physical injuries resulting from the fright caused by the defendant, and the demurrer thereto raises the question whether recovery may be had for physical injuries so caused.

Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided; and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action; some of them hold that the injury is not the proximate result of the alleged negligent or wrongful act, while others refuse a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the purposes of justice. * * * Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. * * * Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. "Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer." 1 Thomp. Neg. 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright. * * *

It is undoubtedly true that the door should not be thrown wide open for trumped-up claims on account of injuries resulting from fright, and we do not intend to so open it in this case. Each case must, of necessity, depend on its own facts. We held in Lee v. City of Burlington, 113 Iowa, 356, 85 N. W. 618, 86 Am. St. Rep. 379, that no recovery could be had for the death of a horse alleged to have been

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caused by fright, because death therefrom could not be anticipated, and hence it was not the proximate result of the defendant's negligence. In Mahoney v. Dankwart, 108 Iowa, 321, 79 N. W. 134, the question before us was not decided. That case was disposed of on the facts there presented, and was a case of simple negligence. * * *

BRAUN v. CRAVEN.

(Supreme Court of Illinois, 1898. 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199.)

Craven went to the house of plaintiff's sister, his tenant, to collect unpaid rent. Plaintiff was sitting on the floor, and her sister was packing up her household goods. The defendant cried in a loud and angry voice: "I forbid you moving. If you attempt to move I will have a constable here in five minutes." Plaintiff averred that she became greatly frightened, and that in consequence of the nervous shock she became ill with St. Vitus dance. A verdict in her favor was rendered for $9,000. The Appellate Court reversed the judgment thereon, and plaintiff appealed therefrom.

PHILLIPS, J.[17] [after reviewing the authorities]. Appellant relies upon Bell v. Railroad Co., 26 L. R. Ir. 432, and Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203. Both of these cases fully sustain the contention of appellant that where sudden terror occasions a nervous shock, resulting from a negligent act, without impact or physical contact, by which the mind is affected, which may press on the health and affect the physical organization, a cause of action for negligence results. These cases have the approval of Mr. Beavan, in his work on Negligence (volume 1, pp. 76–84), and of Mr. Sedgwick, in his work on Damages (8th Ed. § 861). * * * The courts in the above cases seem to have lost sight of the only safeguard against imposition in cases arising from negligence, and that is the elementary rule that, before a plaintiff can recover, he must show a damage naturally and reasonably arising from the negligent act, and reasonably to be anticipated as a result. Two trains might be passing on a double-track road, one carrying passengers, and the other freight, and, at the moment when the engine of the freight train is immediately opposite a passenger car, it might become necessary to sound a whistle, whose effect might be to startle and greatly frighten a nervous person in the passenger car; and the fact that a whistle unexpectedly sounded would be calculated to startle and frighten a nervous person, and that such fright might produce a nervous shock that would cause physical injury, under the principle announced in the Purcell and Bell Cases, supra, would authorize a recovery. That could only be done, under the authority of those cases, by absolutely ignoring the principle that the injury might be reasonably anticipated as the result of the act,

[17] Part of the opinion is omitted, and the statement of facts is rewritten.

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and, where it cannot be so anticipated, the result is too remote. These cases are discussed by Beavan and Sedgwick without laying sufficient stress on this principle.

In our opinion, these authorities, so much relied on by counsel for appellant, are not only against the great weight of authority, but are not sustainable on principle. Appellee, in this case, was on the premises to collect rent, as he lawfully might, without any knowledge of the nervous condition of appellant; and it cannot be said that his manner, language, or gestures, or declared purpose of preventing the removal of the household effects of his tenants, were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant. It could not have been reasonably anticipated by the appellee that any injury therefrom could reasonably have resulted. The action is purely one of negligence; and, if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility, passing by, to sustain a nervous shock productive of serious injury, might be held liable. Thus, one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. Terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability. On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which superinduces nervous shock. * * *[18]

III. Apart from Physical Injury.

WOLF v. TRINKLE.

(Supreme Court of Indiana, 1885. 103 Ind. 355, 3 N. E. 110.)

Zollars, J.[19] The evidence in this case tends to show that at about 8 o'clock at night, when appellee, Jeremiah Trinkle, was away from home, and his wife, Louisa E., was there alone with three small children, and in a delicate condition, appellant went to the house, and, without any forewarning or bidding, opened the door and went in.

[18] See, also, Spade v. L. & B. R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298 (1899); Smith v. P. T. Co., 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374 (1899); Homans v. Railway Co., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324 (1902); Purcell v. St. P. C. Ry. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203 (1892); Bell v. Great Northern Ry., 26 L. R. Ir. 428 (1889); Lee v. City of Burlington, ante, p. 163, note; Hamlin v. G. N. Ry., ante, p. 64; Scheffer v. Railroad Co., ante, p. 163; Kendrick v. McCrary, post. p. 490; Long v. Booe, post. p. 492; and the cases under the headings "Exemplary Damages" and "Aggravation."

[19] Part of the opinion is omitted.

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Louisa E. was in bed with her children at the time. After a few words had passed between her and appellant, he went to the bed, pushed back the covers, laid hands upon and took improper liberties with her person, and so acted as to indicate a lascivious purpose. He remained at the bed for a half hour or more; but, being repelled by her, he desisted, and shortly afterwards left the house. The fright to her was such that she got up and remained up the balance of the night without sleep. The evidence also tends to make good the averments of the complaint, that by and by reason of the indecent assault and battery upon her she has undergone and is still undergoing physical and mental suffering. * * * The jury award $500 in her favor. * * *

The court charged the jury as follows: "(5) If you find for the plaintiff, you will assess in her favor such damages, within the amount claimed, as you think she has sustained, and which will be a compensation to her for any loss and injury occasioned which are the direct results of said defendant's conduct." The court also gave to the jury the following instruction asked by appellee: "No. 1. While the jury are not authorized by the law to give exemplary or punitive damages in this case in the event a verdict is found for the plaintiff, yet if the jury find for the plaintiff, full compensatory damages should be awarded; and in arriving at compensatory damages the jury are not necessarily restricted to the naked pecuniary loss; for, besides damages for pecuniary loss or injury, the jury may allow such as are the direct consequence of the act complained of, for injury to Mrs. Trinkle's good repute, her social position, for physical suffering, bodily pain, anguish of mind, sense of shame, humiliation, and loss of honor."

It was urged below in the motion for a new trial, and is urged in argument here, that the damages are excessive. It is also urged in argument here that the above instructions tended to augment the damages by creating the impression in the minds of the jurors that damages in excess of the injury suffered might be awarded. We do not think that the instructions are open to this objection. The jury was charged in these instructions, in explicit terms, that exemplary or punitive damages could not be awarded, and that the damages should be limited to such injury as was the direct result of appellant's wrongs. The special injuries for which damages might be awarded were not improperly stated. It is well settled that, in a case of the character of this, damages may be awarded for physical suffering, for mental trouble,—as anguish of mind, sense of shame or humiliation, loss of honor and good name,—all of which are considered compensatory, and not exemplary or punitive damages. * * *[20]

[20] See the case of De May v. Roberts, 46 Mich. 160, 9 N. W. 146, 41 Am. Rep. 154 (1881).

Damages for mental suffering are not recoverable consequent upon a solicitation for adultery without assault. Reed v. Maley, 115 Ky. 816, 74 S. W. 1079, 62 L. R. A. 900 (1903).

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MOYER v. GORDON.

(Supreme Court of Indiana, 1887. 113 Ind. 282, 14 N. E. 476.)

MITCHELL, J.[21] This was a suit by Gordon against Moyer and others to recover damages for an alleged unlawful invasion of, and entry into and upon, the house and premises of the former by the latter, and for forcibly ejecting the plaintiff, with his family, household goods, and other personal property, therefrom. * * *

It is insisted that the damages, $500, are excessive, and that the verdict and judgment are not sustained by the evidence. The appellee was in the peaceable possession of the premises in question, not only under a claim of right, but, as the jury find, having the actual right. He had never agreed, as the jury found, that the landlord might, under any pretext, forcibly expel him from the premises. The appellant, we must assume, unlawfully entered upon the premises of which the appellee had the rightful and peaceful possession, and evicted him and his family, together with all their personal effects, therefrom. They took and held possession until they were threatened with force, when they abandoned the premises to the tenant, who is shown to have been lawfully entitled to occupy. The jury were authorized to take into consideration, and compensate the appellee for, the actual injury to his goods and property, the actual inconvenience and expense of being deprived of their use, and of restoring them to their proper places; in addition to which he was entitled to compensation for any bodily or mental anguish or suffering, for injury to his pride and social position, and for the sense of shame and humiliation at having his wife and family turned out of their home into the public street. We cannot say, from anything that appears, that the damages were excessive, nor that the verdict was not sustained by the evidence. * * *

LARSON v. CHASE.

(Supreme Court of Minnesota, 1891. 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370.)

MITCHELL, J.[21] This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed. * * *

There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is

[21] Part of the opinion is omitted

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a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act.

Counsel cites the leading case of Lynch v. Knight, 9 H. L. Cas. 577–598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.

It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental—as for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument.

In Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass

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upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead. * * *[23]

MENTZER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Iowa, 1895. 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294.)

DEEMER, J.[24] * * * On the 11th day of April, 1892, one H. Dorn delivered to the defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message: "Creston, Ohio, 11, 1892. To J. D. Mentzer, Cedar Rapids, Iowa. Mother dead. Funeral Wednesday. Answer if coming or not. H. Dorn." That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employé in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 a. m., April 11, 1892, but, through the negligence and carelessness of defendant's employés, was not delivered until 9 p. m., April 13th. The plaintiff inquired at defendant's office at Cedar Rapids at about 7 o'clock in the evening of April 11th, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11, 1892, and was buried on the 13th, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral. There was also testimony tending to show that plaintiff lost some time from his work, in trying to discover whether a message had been sent him or not. * * *

We have, then, the question as to whether damages for mental suffering can be recovered in actions of this kind, independent of any physical injury, where the company is advised of the character of the message, and negligently fails to deliver it. This question has been variously decided by the different courts of the country, but, up to this time, is an open one in this state. * * *

[23] See, in accord, Koerber v. Patek, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956 (1905), and authorities there cited; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249 (1890); Thirkfield v. M. V. Cem. A., 12 Utah, 76, 41 Pac. 564 (1895); Jacobus v. Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141 (1899); Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759 (1868); Louisville & N. Ry. v. Hull, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 77 (1902).

[24] Part of the opinion is omitted.

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The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages. See Lynch v. Knight, 9 H. L. Cas. 577; Hobbs v. Railroad Co., L. R. 10 Q. B. 122. And doubtless this is the rule of law to-day in all ordinary actions, either ex contractu or ex delicto. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. * * *

Somewhat akin is it to a common carrier, in this: that they are both carriers, and must serve all alike; but the carrier transports persons or goods, while the telegraph conveys intelligence. The very object of the invention is to quickly convey information from one to another, upon which that other may act. It is a public use, and for that reason eminent domain may be exercised in its behalf, and is engaged in a business affecting public interests to such an extent that the state may regulate the charges of companies engaged in the business. It is not an insurer of the accuracy or of the delivery of messages intrusted to it, but it is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties. Nor can it provide by contract for exemption from liability from the consequences of its own negligence. Enough has been stated to show that it owes a duty to all whom it attempts to serve, independent of the contractual one entered into when it receives its messages. Telegraph companies are held, then, to the exercise of due care, and for negligence, either in sending or delivering messages, are liable to any person injured thereby for all the damages he may sustain.

We have stated these rules in order to show that one who is injured by their neglect of duty may maintain an action, either ex contractu or ex delicto, for the injuries sustained. The rule, no doubt, is as announced by Judge Cooley in his work on Torts, at page 104 et seq.: "In many cases an action, as for tort, or an action for a breach of contract, may be brought by the same party on the same state of facts. This at first may seem in contradiction to the definition of a tort as a wrong unconnected with contract, but the principles which sustain such actions will enable us to solve the seeming difficulty.* * * There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. * * * Thus, for breach of the general duty imposed by law, because of the relation one form of action may be brought, and for the breach of contract another form of action may be brought." * * *

Under all known rules of law, plaintiff is entitled to some damages. Defendant insists they are simply nominal, and plaintiff contends he has suffered acute and actual damages, for which he should be compensated. The general rule of damages for breach of contract comes

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down to us from the opinion of Hadley v. Baxendale, 9 Exch. 341. * * *

In actions for tort the rule is much broader. The universal and cardinal principle in such cases is that the person injured shall receive compensation commensurate with his loss or injury, and no more. This includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited or affected, so far as they are compensatory, by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force." Whether the injurious consequences may have been "reasonably expected" to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. As said in Stevens v. Dudley, 56 Vt. 158, "it is the unexpected, rather than the expected, that happens in the great majority of cases of negligence."

Under all the authorities, it was the duty of the defendant to transmit and deliver messages intrusted to it without unreasonable delay; and, in failing to do so, it becomes liable for all damages resulting therefrom. Cooley, Torts, 646, 647; Gray, Commun. Tel. §§ 81, 82, et seq.; Whart. Neg. § 767. That a person is entitled to at least nominal damages for an infraction of the duty imposed upon a telegraph company is conceded. And it must also be conceded that every person desires to attend upon the obsequies of his near relations. And when, able and anxious to attend, he is, through the negligence of a telegraph company, not notified of their death in time to attend the funeral, he naturally and almost inevitably suffers mental pain and anguish. No man is so depraved but that he yet remembers his mother, and, when able, will pay her the last respect that is her due.

In the case at bar it is established that defendant knew the nature of the intelligence it was to transmit, and also knew that, if it was not delivered within a reasonable time, plaintiff was likely to be greatly pained on account not only of not knowing of the death of his mother until she was placed under the ground, but also because of his inability to attend the funeral on account of the delay. That the defendant should reasonably have contemplated such results, under the rule laid down in Hadley v. Baxendale, is clear.

But it is insisted that damages for mental suffering, although contemplated by the parties, cannot be recovered for mere breach of contract. That such is the general rule announced by the courts, and that it is the rule now with reference to all ordinary contracts, must be conceded. But it must be remembered that this rule grew up at a time when there was no thought of the transmission of intelligence by electricity. Breaches of contract, such as the one in question, were

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unknown to the common law. The business of telegraphy has grown up within comparatively recent years. But must we say that the law furnishes no remedy because no case of the kind was known to the common law? If so, such law is no longer applicable to our present conditions. Regard must be had, too, to the subject-matter of the contract. The message does not relate to property. In such cases for breach of contract the law affords adequate compensation. But it does relate to the feelings, the sensibilities, aye, sometimes even to the life, of the individual. It does not affect his pocketbook seriously, but it does relate to his feelings, his emotions, his sensibilities,—those finer qualities which go to make the man. Shall we say that in one case the law affords compensation, and in the other it does not? Instead of goods which are conveyed by the defendant, it is intelligence,—thought. If defendant were a common carrier of goods, it would be liable for all damages sustained by reason of its breach of contract to deliver them within a reasonable time.

But it is said no damages can be recovered for failure to deliver intelligence, beyond the amount actually paid for the message, or nominal damages, although the addressee may endure the greatest of mental pangs, notwithstanding the fact that such suffering was in the contemplation of the parties at the time the contract was made. Of course, every breach of contract is likely to cause some pain, but most of these contracts relate to property and pecuniary matters, and in such case the law furnishes what has always been held to be an adequate remedy for the pecuniary loss sustained. Mental suffering has never been considered as within the contemplation of the parties at the time the contract is entered into, and recovery cannot be had therefor. But few contracts have direct relation to the feelings and sensibilities of the parties entering into them, and the pain growing out of the ordinary breach of contracts relating to property is entirely different from that suffered from a death message. Suth. Dam. § 980.

We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases the defendant, in making his contract, is dealing with the feelings and emotions. The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case. See Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Royal v. Smith, 40 Iowa, 615.

The distinction we have pointed out is well stated in 1 Suth. Dam. § 92. Other exceptions have sometimes been made, which we need not further refer to. As said in the case of Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574: "These illustrations serve the purpose of showing that in the ordinary contract only pecuniary bene-

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fits are contemplated by the contracting parties, and that, therefore, the damages resulting from such breach of contract must be measured by pecuniary standards, and that, where other than pecuniary benefits are contracted for, other than pecuniary standards should be applied in the ascertainment of damages flowing from the breach." * * *

Reverting now to the damages which may be allowed if the action is treated as ex delicto, and to the broader rule of damages in cases of tort, we find that, in very many of these actions, damages are recoverable for mental anguish, some of which we will refer to hereafter. It is conceded by appellant's counsel that such damages may in certain cases be recovered, but they insist that they are never recoverable unless accompanied by some physical injury. It seems to us that, when it is conceded that mental suffering may be compensated for in actions of tort, the right of plaintiff to recover in this case is established. Let us look to some of the cases authorizing recovery in such cases, and see if there are no analogies.

Damages for injuries to the feelings are given, though there are no physical injuries, where a person is wrongfully ejected from a train. Shepard v. Railway Co., 77 Iowa, 54, 41 N. W. 564. In actions for slander and libel. Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420. For malicious prosecution. Fisher v. Hamilton, 49 Ind. 341. For false imprisonment. Stewart v. Maddox, 63 Ind. 51. For crim. con. and seduction, and for assault. So damages for injured feelings were allowed where a conductor kissed a female passenger against her will. Craker v. Railway Co., 36 Wis. 657. So, likewise, it has been held that the removal of the body of a child from the lot in which it was rightfully buried, to a charter plot, gives the parent a right to recover for injury to his feelings. Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759. And a widow may recover for such suffering and nervous shock, against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damages are alleged or proven. Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. See, also, Suth. Dam. § 979, and authorities cited for kindred cases.

The wrongs complained of in these cases all directly affected the feelings, and injury thereto proximately resulted. But not more so than in the case at bar, where the injury to the feelings is apparent, and suffering necessarily followed. This rule of necessity applies where the feelings are directly affected by the nature of the wrong complained of. It has no application to such mental suffering as indirectly results from the commission of every tort.

Let us now look to our own cases for a moment, and see what has been held. In the case of Stevenson v. Belknap, 6 Iowa, 103, 71 Am. Dec. 392, which was an action brought by a father for the seduction of his daughter, this court approved an instruction that damage may be given, not only for his loss of service and actual expenses, but also on account of the wounded feelings of the plaintiff, and of his anxiety,

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as a parent of other children, whose morals may be corrupted by the example. In the case of McKinley v. Railroad Co., 44 Iowa, 318, 24 Am. Rep. 748, which was an action for an assault by one of defendant's employés upon the plaintiff, the lower court instructed the jury that plaintiff might recover, as compensatory damages, not only for bodily pain and suffering, but for the outrage and indignity put upon him. * * *

In the quite recent case of Shepard v. Railway Co., 77 Iowa, 58, 41 N. W. 564, we went still further, and squarely held that damages for mental suffering are recoverable, although there was no physical pain or injury. In that case we said: "If these things [wounded feelings] may be considered in connection with physical suffering, in estimating actual damages, we know no reason which forbids their being considered in the absence of physical suffering. It is said that the 'mental pain' contemplated by the court in the case last cited [44 Iowa, 315, 24 Am. Rep. 748] includes something more than mere wounded feelings or wounded pride, and that the latter can be considered only where malice is alleged and proven, and where there has been proof of actual bodily injury. We do not think the claim is well founded. Humiliation, wounded pride, and the like may cause very acute mental anguish. The suffering caused would undoubtedly be different in different persons, and no exact rule for measuring it can be given. In ascertaining it, much must necessarily be left to the discretion of the jury, as enlightened by the charge of the court. The charge given in this case, as a whole, confined the jury to an allowance for compensatory damages."

In the case of Curtis v. Railway Co., 87 Iowa, 622, 54 N. W. 339, this court squarely held that damages might be recovered for mental pain and suffering, although the damages for physical injury were merely nominal; and further held that such damages were compensatory, and not punitive. In the case of Parkhurst v. Masteller, 57 Iowa, 480, 10 N. W. 864, which was an action for malicious prosecution, this court * * * held that in such actions actual damages would include compensation for bodily and mental suffering, and clearly held that damages for mental suffering might be recovered in such cases, although entirely disconnected from bodily suffering or disability. In a case of assault and battery (Lucas v. Flinn, 35 Iowa, 9), this court held that damages for mental anguish might be allowed as compensation. In the case of Paine v. Railroad Co., 45 Iowa, 569, the rule * * * was recognized; but it was held there was no right of recovery for injury to feelings, on account of the peculiar facts of that case. And the case of Fitzgerald v. Railroad Co., 50 Iowa, 79, merely follows the Paine Case, and holds that, under the facts, plaintiff was not entitled to recover. The rule of the McKinley Case has never, to our knowledge, been doubted by any later decision. In the case of Stone v. Railroad Co., 47 Iowa, 88, 29 Am. Rep. 458, it was held

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that the action in that case, owing to its peculiar facts, was an action for breach of contract; and that damages for mental suffering were not recoverable, and in this case it is said: "Insult and abuse accompanying a breach of contract cannot affect the amount of recovery in such actions. If the action is based upon a wrong, the jury are permitted to consider injury to feelings, and many other matters which have no place in actions to recover damages for breach of contracts"; citing Walsh v. Railway Co., 42 Wis. 23, 24 Am. Rep. 376. It is enough to say here that the action at bar is ex delicto, or that damages may be recovered as if it were, under our system of Code pleading. * * *

From these cases it is apparent that in actions of tort this court has frequently announced the rule that damages for mental suffering may be recovered, although there is no physical injury. And, if this be so, why is not this a case where they ought to be allowed? It cannot be possible that here is a legal wrong for which the law affords no remedy. The wrong is plain, the injury is apparent, and we think the law affords a remedy, for compensatory damages, under the rules above given. It must not be understood to follow that, in all actions ex delicto, damages for mental suffering may be allowed. There must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish. But, when there is this connection so manifest as in the case at bar, we think such damages ought to be allowed. It is very appropriately said, however, in one of the cases which has been cited, that "great caution should be used in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which recovery may be had; and the attention of juries might well be directed to this fact."

It is not necessary for us to determine on which theory damages for mental anguish are recoverable. If we find they are recoverable, either in an action for breach of contract, or by reason of a breach of public duty, then the instruction given by the lower court was correct, and should be sustained. It will be noticed that, in some of the cases holding to a contrary doctrine from that here announced, recovery was denied because of the form of the action; that is to say, it was held that the action in the particular case was for breach of contract, and that damages for mental suffering were not recoverable in such an action. Whether they would be recoverable in actions ex delicto or not was not determined. Let us look for a moment to some of the objections urged to such a rule as we have announced.

First. It is said that such suffering is speculative and remote. We have, as we think, answered this by showing that in actions of this kind it is direct and proximate to the wrong complained of.

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Second. It is urged that such damages are sentimental, are vague and shadowy, and that there is no standard by which an injury can be justly compensated or approximately measured. This objection is answered if we find any case in which such damages are allowed, for if they may be allowed in one kind of case they may in all, so far as this objection is concerned. We have already seen numbers of cases, both from this and other states, wherein it is held that damages for mental suffering, independent of physical injury, may be recovered. It is conceded by counsel that damages can be recovered for mental suffering when accompanied by physical pain or bodily suffering. If this be true, then let us ask how they can be any more accurately measured when so accompanied than when not. When it is once conceded that mental anguish can be considered, and compensation made therefor, then the objection last urged falls to the ground.

Third. It is said there is no principle on which such damages can be recovered. We have endeavored to show, to the best of our ability, that there is abundant authority to justify a recovery in such cases.

Fourth. It is contended that the rule opens up a vast and fruitful field for speculative litigation. We have endeavored to so guard and limit the rule that there may be no mistaking its operation and effect. If recovery is for breach of the contract, then it can only be had because of the subject-matter—the fact that it is intelligence that is transmitted, and the feelings only affected. And, if the recovery is had because it is a tort, then a somewhat similar limitation is made, which we have tried to make apparent. If, as thus limited, the rule opens up a vast and fruitful field of litigation, it is only because telegraph companies fail to do their duty. We cannot think that a rule which will tend to make telegraph companies more careful in the matter of delivering their messages will be fraught with such fearful results as counsel imagine. The single, plain duty of a telegraph company is to make transmission and delivery of messages intrusted to it with promptitude and accuracy. When that is done its responsibility is ended. When it is omitted, through negligence, the company should answer for all injury resulting, whether to the feelings or the purse, one or both, subject to the proviso that the injury must be the natural and direct consequence of the negligent act. We cannot conceive of any danger in such a rule. It seems to us to be in accord with the enlightened spirit of modern jurisprudence, and that in actual practice no evil can result therefrom. Juries may be prone, in cases of this kind, to place their estimates high; but the judge is ever present, with a restraining power, ample to prevent unconscionable and unjust verdicts. * * *

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CONNELL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Missouri, 1893. 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575.)

GANTT, P. J.[25] This is an action for damages for the negligence of defendant in failing to deliver to plaintiff the following telegraphic message sent to him by his wife: "Sedalia, Mo., Dec. 13, 1889. To Matt Connell, Soldiers' Home, Leavenworth, Kansas: Your child is dying. Mary." The plaintiff alleged that his wife paid the customary charge, 50 cents, for its transmission, and that he had refunded that sum to her. Plaintiff then alleges that his child died on the 24th day of December, 1889, "and that if said message had been transmitted and delivered with any degree of diligence or promptness whatever, he would have been able to be present with his said child during its last sickness, and at its death, and that by reason of the great negligence and carelessness of defendant in failing to deliver said message, and of his being thereby deprived of being with his said child during its last sickness, and at its death." * * *

The sole question discussed by the appellant in this case is this: "Where a telegraph company is advised by the contents of a message that great mental suffering and pain will naturally result from its neglect to transmit and deliver the message promptly, can damages be recovered by the sendee for such mental agony and distress, caused by a failure to promptly transmit and deliver?" The proposition, it will be observed, relates simply to damages arising from a breach of contract. Prior to this time there had been but one opinion expressed in the decisions of this court, and that is clearly adverse to the contention of the appellant, and this is not questioned by the able counsel who represents the appellant; but he urges that, inasmuch as telegraphy is of comparatively recent origin, we should, in view of the function it performs, make an exception in the construction of the contracts made by those engaged in it, and the damages which flow from a breach thereof. That an action for mental anguish, disconnected with physical injury, for the breach of a contract, could not be maintained at common law, with the single exception of the breach of a marriage contract, we think, is abundantly established. Wood, Mayne, Dam. 75; Lynch v. Knight, 9 H. L. Cas. 577. * * *

The general rule is that "pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity." * * * The rule announced is in strict harmony with that of the courts of last resort in our sister states, until, in 1881, the Supreme Court of Texas, in So Relle v. Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805, announced the doctrine that the sender of a social telegram could recover for the

[25] Part of the opinion is omitted.

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mental anguish caused by delay in its delivery. The authorities relied upon by the Supreme Court of Texas in that case were actions for physical injuries, in which the mental agony formed an inseparable part—a doctrine never questioned in this state since Porter v. Railroad Co., 71 Mo. 66, 36 Am. Rep. 454. * * *

The Texas case has been followed in that state in a great number of cases, and has been adopted in Indiana, North Carolina, Kentucky, Alabama, and Tennessee. On the other hand, this new departure has been vigorously assailed and denied by the Supreme Courts of Mississippi, Georgia, Kansas, and in Dakota, and in a most luminous dissenting opinion by Judge Lurton, of the Supreme Court of Tennessee, now judge of the United States Circuit Court for the Sixth circuit, in which Folkes, J., concurred. The majority of the Supreme Court of Tennessee do not go to the length contended for by the appellant here. The majority lay great stress upon the fact that by virtue of a statute in Tennessee a cause of action is given to the aggrieved party for damages for failure to deliver any message. Hence they argue that, as the party has the right to some damages by virtue of the statute, they conclude they may add the anguish of mind as an element. It is impossible to escape the feeling that the very able judges were resorting to a fiction to justify them in supporting the action. The case of So Relle v. Telegraph Co., 55 Tex. 310, 40 Am. Rep. 805, has been nowhere more flatly repudiated than by the Supreme Court of Texas itself, in Railway Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278. Judge Stayton, in an able and lucid discussion of the authorities, demonstrates "that the cases in which damages have been allowed for mental distress * * * was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property, in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of. They are not cases in which the bodily injury or other wrong was suffered by one person, and the mental distress by another." * * *

But it is said damages for injury to the feelings have always been allowed in actions founded upon a breach of promise to marry, and this is true in this as in other states. Wilbur v. Johnson, 58 Mo. 600; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788. But it has always been regarded as an exception to the rule. In this action plaintiff's pecuniary loss forms an important element. The action is of common-law origin, and at common law the husband, on marriage, became liable for the wife's debts, and for support in a manner and style commensurate with his own social standing, and evidence of his station in life and financial condition has always been admitted. Wilbur v. Johnson, supra. As was well said by Cooper, J., in Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300: "This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort; and. though the damages recoverable for the plaintiff for mental suffering

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are spoken of as 'compensatory,' the fervent language of the courts indicates how shadowy is the line that separates them from those strictly pecuniary." "Especially those cases in which evidence of seduction is admitted to ascertain the damages. So much, indeed, does the motive of the defendant enter into the question of damages, that in Johnson v. Jenkins, 24 N. Y. 252, the defendant was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health."

These considerations sufficiently indicate the reasons that actuated the courts to make this exception. Few precedents for this action will be found where the defendant was impecunious. The learned counsel has collected various other cases in which mental anguish was recognized as an element of damage, and concludes with the query, "If allowed in these, why not in this action?" Let us consider these in the order of his brief:

Assault and battery. Under this head is cited the case of Craker v. Railway Co., 36 Wis. 657, 17 Am. Rep. 504. In that case the conductor of a train seized upon the moment when the other employés were absent from the car to take improper liberties with a lady passenger. The evidence showing that he placed his arm around her, and, against her vehement protests, kissed her. It was a clear physical violation of her person, which the courts have ever held constituted an assault and battery, and actionable. The law redresses such a wrong in its initial stages. The protection of the person has ever been an object of great solicitude to the common law. The present ability of actual violence often justifies recourse to extreme measures in preventing a consummation of threatened wrong to the person. The cases cited under this head clearly add no weight to plaintiff's claim.

The cases of malicious prosecution and false imprisonment come under that general class of willful wrong to the person, affecting the liberty, character, reputation, personal security, and domestic relations. Judge Lumpkin, in Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, disposes of the argument attempted to be drawn from this class as follows: "In an action for wrongful attachment, on the ground that the defendant was about to dispose of his property with intent to deprive his creditors, it was held (by a divided court) that the mortification was a part of the actual damages. Byrne v. Gardner, 33 La. Ann. 6. Of course it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages. Fisher v. Hamilton, 49 Ind. 341; Stewart v. Maddox, 63 Ind. 51; Coleman v. Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449. Of course, such injuries are essentially willful, and, besides, are violations of the great right of personal security or personal liberty."

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As to the action of seduction, every lawyer knows that proof of some service by the daughter has been invariably required to sustain it; and the same rule is rigidly adhered to in Magee v. Holland, 27 N. J. Law, 86, 72 Am. Dec. 341, to which we are cited by counsel, for the forcible abduction of a daughter. In the case of enticing away a daughter, we are referred to Stowe v. Heywood, 7 Allen (Mass.) 118. The court permitted damages for mental suffering on the express ground that it was a willful injury, and declined to say whether such damages could ever be recovered for negligence alone, as in the case at bar. This case illustrates the greatest difficulty in estimating damages for mental suffering. Judge Metcalf says: "Mental suffering cannot be measured aright by outward manifestations, for there may be a show of great distress where little or none is felt. And great distress may be concealed, and borne in silence, with an apparently quiet mind. Ab inquieto sæpe simulatur quies." "And we nowhere find that any other evidence of mental suffering, besides that of the injury which was the alleged cause of action, was ever before admitted." The court reversed the case because the trial court permitted evidence "tending to show" plaintiff suffered from "pain and anxiety of mind."

It is hardly necessary to add that in a case of libel or slander, if the words are not actionable per se, special damages must be alleged and proved. When they are actionable per se, they are construed because of their evident tendency to degrade the citizen in the estimation of his neighbors, and in both cases they are malicious. * * *

Speaking for ourselves, we are satisfied that the common law, denying an action for mental distress alone, was founded upon the best of reason, and an enlightened public policy. And we question if the real reasons were ever more clearly and satisfactorily stated than by Judge Lurton, which opinion we adopt: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority [of the Su-

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preme Court of Tennessee]. * * * It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injury to the feelings, mental distress and humiliation, when such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement willfully, with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental sufferings? * * * Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language, not charging a crime, or resulting in special pecuniary damages? Mental distress is, or may be in some cases, as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime; yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered."

Why, if this rule is to become the law of this state in regard to this contract, shall it not apply to all disappointments and mental sufferings caused by delays in railroad trains? Telegraph companies are common carriers; so are railroad companies; and yet this court, in the Trigg Case, held the company not liable for mental anguish, as an independent cause of action for a mere act of negligence. A similar conclusion was also reached in the United States Circuit Court for the Fourth circuit in Wilcox v. Railroad Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804, where the plaintiff made a special contract for a train to take him to the bedside of a sick parent. The court held that the trouble of mind caused by the delay at a railroad station could not be made the basis of an action, saying: "But we know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action. The plaintiff was the subject of two mental pains—one, for the condition of the sick person; the other, from the delay at the station—the latter, only, being the subject of this action. It cannot be pretended that damages from the latter cause of 'anxiety' and 'suspense'—uncertain, indefinite, undefinable, unascertainable, dependent so largely on the peculiar temperament of the person suffering the delay—was in the contemplation of the defendant when it entered into the contract." Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479.

But, as before said, if we establish the rule as to one common carrier or private person, with what sort of consistency can we refuse to extend it to all? The courts of Texas have already spoken of a similar case as "intolerable litigation." We see no reason for making this innovation or exception. The Legislature has imposed a penalty for each infraction of its duty in delaying a message, and it seems very

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clear to us that, if it is to become the policy of the state to adopt this new rule, the Legislature, and not this court, should do it. The common law has always attempted to deal with the citizen, and his rights and wrongs, in a practical way, and the declared object of awarding damages is to give compensation for pecuniary loss. The right, in a civil action, to inflict punishment by way of punitory damages, has been ably controverted. The allowance of damages for wounded feelings, when they are the concomitant or result of a physical injury, is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles, and an injury to the body included the whole, and its effects were not separable; but the experience of every judge and lawyer teaches him how unsatisfactory, in these personal injury cases, are the verdicts of juries. They are utterly inconsistent, and the courts do not attempt to justify these inconsistencies upon any other theory than that it is the sole province of the jury to fix the amount. The result is that, in nearly every appeal that reaches this court, one ground for reversal is the excessive damage awarded; and the right of this court to interfere at all on this ground is seriously challenged. It is no uncommon thing to have the appellee voluntarily enter a remittitur to save his verdict from the charge of passion or prejudice.

Under these circumstances, is it wise to venture upon the far more speculative field of mental anguish, without guide and without compass? We think not. We have examined the cases in the courts of Kentucky, Indiana, Tennessee, Alabama, and North Carolina. They are all based upon the So Relle Case, in 55 Tex. 308, 40 Am. Rep. 805, which, we have shown, stands upon no previous adjudication, but is opposed by the Levy Case, 59 Tex. 563, 46 Am. Rep. 278, which, to our minds, completely refutes it. * * *[26]

CHAPPELL v. ELLIS et al.

(Supreme Court of North Carolina, 1898. 123 N. C. 259, 31 S. E. 709, 68 Am. St. Rep. 822.)

DOUGLAS, J.[27] This is an action to recover damages for the unlawful seizure and detention of personal property, and also for mental suffering caused thereby. The plaintiff * * * alleges "that she is old and infirm, having reached the age of 64 years, and has to depend upon her own labor and exertion for a support; and after the removal of the said property, * * * she had nothing upon which to live, and no home to shelter her body; that by the wrongful act * * * in taking from her the said property, contrary to the writ

[26] There are many cases involving this point. The great weight of authority is with Connell v. W. U. T. Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575 (1893). See, also, W. U. T. Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300 (1891).

[27] Part of the opinion is omitted.

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aforesaid, and without authority in law, and depriving her of the only means of support she then had, in her advanced age in life, she has suffered greatly in body and mind, to her damage $500." * * *

The doctrine of mental suffering, or "mental anguish," as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary, punitive, or vindictive damages as they are variously denominated. * * *

The question of exemplary damages does not appear to have been raised in the trial of the action, as no such issue or instruction was asked by either party. The theory of the plaintiff was the recovery of compensatory damages for mental anguish, under the rule laid down in Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, and analogous cases. This rule cannot be extended to the case at bar. The plaintiff is entitled to recover all her actual damages sustained from the wrongful act of the defendants, including not only the value of the property not returned, but also whatever damages may have accrued from its seizure and detention. Furthermore, she may be allowed exemplary damages, in the discretion of the jury, if such circumstances of aggravation are shown as would bring her within the rule; but her case does not come within the doctrine of "mental anguish." It is true the two doctrines are somewhat similar, inasmuch as they recognize suffering other than physical or pecuniary; but they are so widely distinguished in their application that they are universally recognized as distinct principles, wherever they are recognized at all.

It is urged on behalf of the plaintiff that this case should be governed by the principles laid down in Cashion v. Telegraph Co., 123 N. C. 267, 31 S. E. 493. We see no resemblance. Our opinion in Cashion's Case was hinged on the solemn fact of death and the associations inseparable from the final severance of all earthly ties by an immortal spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heartstring, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig. We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter, and with but little to eat; but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforceable in a court of law. * * *[28]

[28] Accord: Morris v. Williford (Tex. Civ. App.) 70 S. W. 228 (1902).

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HEWLETT v. GEORGE.

(Supreme Court of Mississippi, 1891. 68 Miss. 703, 9 South. 885, 13 L. R. A. 682.)

Sallie A. Hewlett, a minor, brought this action by her next friend, against George, as executor of her mother, Sarah A. Ragsdale, for having willfully and maliciously caused her to be imprisoned for ten days in the East Mississippi Insane Asylum, pursuant, as plaintiff alleged, to a plot to get control of her property. Plaintiff was allowed by the court below to recover only $200, which had been paid by her to procure her release from the asylum.

WOODS, J.[29] * * * The jury was told that a recovery might be had for actual damages, but by the second refused instruction of the plaintiff actual damages were held not to include compensation for mental suffering and pain, the sense of humiliation, shame, and disgrace, and injury to reputation, inflicted upon and endured by plaintiff. Here was actual damage to the extent of $200, and actual damage for 11 days of time lost during confinement in the asylum, and to these should have been added damages for mental pain and suffering, shame, and mortification, and injury to character. Surely these injuries were real ones, and compensation for these would have been an award of actual damages. Compensatory and actual damages are one, and compensation for wrongs done to one's character is in no sense punitory. We cannot consent that actual damages in this case must be confined to the few dollars and cents shown to have been expended by plaintiff to secure her release from the asylum, and that no compensatory damages were awardable for shame and anguish and hurt to character. On this point we are of opinion the action of the trial court was erroneous, and that its judgment must be reversed. * * *

PRIME v. EASTWOOD.

(Supreme Court of Iowa, 1877. 45 Iowa, 640.)

This is an action for the recovery of damages for slanderous words alleged to have been spoken by defendant concerning plaintiff, charging plaintiff with stealing defendant's hogs.

DAY, C. J.[29] * * * The plaintiff, against defendant's objection, was permitted to prove that, in consequence of the charge, he had been troubled, and suffered mental anxiety. If this testimony was at all admissible it must have been for the purpose of aggravating the damages. The action of slander is given for injuries affecting the reputation. In Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, it was held that special damages, to support an action for defamatory

[29] Part of the opinion is omitted.

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words not actionable in themselves, must result from injury to the plaintiff's reputation which affects the conduct of others toward him, and that his mental distress, physical illness and inability to labor, occasioned by the aspersion, are not such natural and legal consequences of the words spoken as to give an action.

In this case the court say: "It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action, for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise, his strength of mind to disregard abusive, insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of the ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable per se, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature, and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss."

The same doctrine is announced in Wilson v. Goit, 17 N. Y. 442. It seems to us that these cases announce the proper doctrine. If mental anxiety and distress of mind do not constitute such special damages as will sustain an action of slander for words not actionable per se, it is because distress of mind and mental anxiety do not constitute such damage as can be redressed by an action for slander, and consequently they cannot enhance the damages when the words spoken are actionable per se. And this is the view declared in Townshend on Slander and Libel, § 391, in which it is said: "The plaintiff, to aggravate damages, cannot prove the defendant's wealth, nor that it was currently reported that defendant had charged the plaintiff with the crime mentioned in the declaration, nor that the plaintiff had suffered distress of mind." The case of Swift v. Dickerman, 31 Conn. 285, holds a contrary view. So, also, does Dufort v. Abadie, 23 La. Ann. 280. * * *[31]

[31] See, also, cases under headings "Aggravation," "Exemplary Damages," and "Breach of Promise."

Devens, J., in Mahoney v. Belford, 132 Mass. 393 (1882):

"Upon the question of damages the court instructed the jury 'that they might consider the injury, if any shown, to the mental feelings of the plaintiff, which was the natural and necessary result of the words used, if in fact they were used as alleged, and were slanderous; that mental suffering was an element of damage.' This was correct. The words, if uttered at all, were uttered, as appears by the bill of exceptions, in an angry dispute at an election, in the presence of from twenty to sixty persons. While the evidence was circumstantial, and not direct, that the plaintiff had been actually damnified and

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had endured mental suffering in consequence, 'the occasion, circumstances, manner and nature' of the alleged slander were such as warranted the plaintiff in contending that they had occasioned actual injury and mental suffering, and in seeking substantial damages therefor. 'Undoubtedly,' said Chief Justice Bigelow in Markham v. Russell, 12 Allen, 573, 90 Am. Dec. 169, 'the material element of damage in an action for slander is the injury done to character. But it is not the sole element. A jury may have a right also to consider the mental suffering which may have been occasioned to a party by the publication of the slanderous words.' See, also, Marble v. Chapin, 132 Mass. 225."

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CHAPTER III.

PECUNIARY CONDITION OF PARTIES AS AFFECTING THE ALLOWANCE OF DAMAGES.

SECTION 1.—OF PLAINTIFF.

BECK v. DOWELL.

(Supreme Court of Missouri, 1892. 111 Mo. 506, 20 S. W. 209, 23 Am. St. Rep. 547.)

GANTT, P. J.[1] * * * Is evidence of the financial condition of the plaintiff admissible in an action for damages, when there are circumstances of oppression or malice? * * * The evidence in this case tended to show that the plaintiff was a girl about 16 years old; that her father was a tenant of defendant; that on the day she was shot by defendant her father and his sons were trying to water a cow in a lot of the defendant; that a difficulty ensued—a general fight; that she was standing in the lot looking on, unarmed, when the defendant turned upon her, and shot her through the thigh. In other words the defendant, with a deadly weapon, shot an unarmed girl without lawful provocation. We think there was ample evidence from which the jury could find willful, wanton injury. In 1 Suth. Dam. p. 745, it is said: "In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts. These embrace the res gestæ and the age, sex, and status of the parties; this, whether the case be one for compensation only, or also for exemplary damages, when they are allowed."

In Bump v. Betts, 23 Wend. 85, the Supreme Court of New York, on a question of excessive damages, pointed to the fact that the defendant had the command of great wealth, and that the plaintiff was a poor man.

In McNamara v. King, 7 Ill. 432, in an action for assault and battery, the court permitted the plaintiff to show he was a poor man with a large family. The Supreme Court of Illinois, in affirming that rul-

[1] Part of the opinion is omitted.

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ing, said: We are also of the opinion that the circuit court decided correctly in admitting the evidence and giving the instruction. In actions of this kind, the condition in life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating the damages. Their pecuniary circumstances may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured." In Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88, in an action for seduction, the trial court admitted evidence to show plaintiff was a poor man. The Supreme Court, on appeal, said: "The court therefore decided correctly in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury for the purpose of exciting their prejudices in favor of the plaintiff because he is a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitle him to receive."

In Gaither v. Blowers, 11 Md. 536, in an action for assault and battery, the trial court having admitted evidence for the plaintiff, with a view of increasing his damages, that he was a laboring man and had a wife and children to support, the Supreme Court, after quoting the language of McNamara v. King, 7 Ill. 432, says: "This is good sense, and is sustained by the decisions in most of the states. An injury done to a person not dependent on manual labor for the support of himself and family is in no wise as great as one to a person so situated."

In Reed v. Davis, 4 Pick. 215, the Supreme Court of Massachusetts, in an action for trespass in forcibly evicting plaintiff from his home, says: "One of the defendants stated to a witness, in answer to his inquiry whether he thought the plaintiff could not make him suffer, that 'the plaintiff had been to jail, and sworn out, and was not able to do anything.' Now, that circumstance was to be taken into consideration by the jury. There is nothing more abhorrent to the feelings of the subjects of a free government than oppressing the poor and distressed under the forms and color, but really in violation, of the law." "It is found that the dwelling house was small, but the damages are not to be graduated by the size of the building. The plaintiff also was poor. He had seen better days, but had been reduced in his circumstances. He was thought not to be able to do anything in vindication of his rights at the law."

In Dailey v. Houston, 58 Mo. 361, this court said: "It is next insisted that the court improperly told the jury that, in the estimation of damages, they might take into consideration the 'condition in life of

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plaintiffs, and their pursuits and nature of their business.' There is no doubt but that, in estimating damages in such cases, the jury may properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness, or atrocity or want of atrocity, in the transaction, and which tend to characterize the assault." This decision of Judge Vories was concurred in by all the judges. It has never, to our knowledge and so far as we can ascertain, been questioned, denied, or criticised. It is in harmony, as we have seen, with the decisions of other courts of great ability. It is in harmony with the tendency of the courts to place before the triers of facts, whether court or jury, every fact that will aid them in arriving at a correct verdict. It is evident in this case its effect was not to create prejudice or passion. * * *

PENNSYLVANIA CO. v. ROY.

(Supreme Court of United States, 1880. 102 U. S. 451, 26 L. Ed. 141.)

The action was for personal injuries sustained by plaintiff by reason of the falling of a defective upper berth of a sleeping car upon his head.

HARLAN, J.[2] * * * The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children—a son ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict.

The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence in regard to the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn, and should not be ignored in the assessment of damages. * * * Reversed.

[2] Part of the opinion is omitted.

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VANDERPOOL v. RICHARDSON.

(Supreme Court of Michigan, 1883. 52 Mich. 336, 17 N. W. 936.)

Action for breach of promise of marriage.

COOLEY, J.[3] This suit was instituted for breach of promise of marriage. * * * The plaintiff was * * * suffered, in answer to the question whether she had any property of her own, to say that she had none. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141, is relied upon as authority against this evidence. The suit in that case was brought to recover damages for a personal injury, and the court very properly held that these damages did not at all depend upon the wealth or poverty of the plaintiff. But when the suit is for the loss of a marriage and of an expected home, the fact that the plaintiff is without the means to provide an independent home for herself is not entirely unimportant. It may be supposed to be one of the facts which both parties had in mind in making their arrangements; and it is not improper that the jury should know of it also and take it into account in making up their verdict.

In his charge to the jury the judge told them they might take into consideration the length of time the engagement had continued between the parties. Exception was taken to this, but it was a very proper direction. He also told them that if they should find that the defendant wantonly, willfully, and causelessly broke the engagement, they might, in their estimate of damages, consider the injury to the plaintiff's feelings and reputation, and any circumstances of indignity under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act tending to the plaintiff's discomfort. This is complained of as having no evidence to support it. But we do not think the case is entirely without evidence to justify such a charge. The proofs tended to show that the engagement was made known to the lady's immediate friends; that it was broken without cause or warning by a marriage with another; and that then the defendant denied ever making it. There were certainly in these facts circumstances of mortification, and their tendency was to bring the plaintiff into public disgrace. We find no error in this or in any of the other rulings complained of. * * *

[3] Part of the opinion is omitted.

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SECTION 2.—OF DEFENDANT.

BENNETT v. HYDE.

(Supreme Court of Connecticut, 1825. 6 Conn. 24.)

HOSMER, C. J.[4] * * * It has been frequently adjudged, in this state, and may be considered as established law, that the plaintiff in an action of slander may prove the amount of the defendant's property to aggravate damages; and, on the other hand, that the defendant may recur to the same evidence for the purpose of mitigating them. The same rule is deducible from the law of Massachusetts (Larned v. Buffinton, 3 Mass. 546, 3 Am. Dec. 185), admitting evidence in proof of the plaintiff's rank and condition, to increase the damages, or to lessen them, according as the facts should be found. It is not to be inferred, that the damages are, of course, to be proportioned to the defendant's property; but merely that property forms an item, which, in the estimate, is deserving of regard. Great wealth is generally attended with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and, as a consequence not uncommon, of small influence. Property, therefore, may be, and often is, attended with the power of perpetrating great damage, and, in the estimate of a jury, becomes an interesting enquiry. I am not asserting what ought to be, but what is; and that the degree of injury, necessarily, is dependent, in some measure, on the considerations before mentioned. * * *

JOHNSON v. SMITH.

(Supreme Judicial Court of Maine, 1875. 64 Me. 553.)

Trespass by George W. Johnson against Manasseh Smith for assault and battery. The defendant offered evidence of his property and means, as bearing upon the matter of punitive damages and in mitigation thereof. The plaintiff introduced no evidence tending to show that the defendant had any property whatever, and did not claim that the damages should be increased by reason of wealth or any pecuniary ability on the part of the defendant. The court excluded this evidence offered by the defendant, and he excepted.

[4] Part of the opinion is omitted.

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DANFORTH, J.[5] * * * So far as the cause of action rests upon an injury to the character, or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater. Humphries v. Parker, 52 Me. 507, 508; 2 Greenl. Ev. § 269. But in such cases, as it is rather the reputation for, than the possession of, wealth, which is the cause of this increased rank, the testimony must correspond, and only the general question as to his circumstances can be asked, and not the detail. Stanwood v. Whitmore, 63 Me. 209.

But when exemplary damages are claimed, a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger McBride v. McLaughlin, 5 Watts (Pa.) 375. Upon this point actual wealth could only be material. As bearing upon this point the testimony was offered and excluded. This took from the jury an element proper for their consideration.

It is true the plaintiff offered no proof upon this point and claimed no damages by reason of defendant's "wealth or pecuniary ability;" but if it was competent for the plaintiff to prove defendant's wealth to increase his damages, it was equally competent for the defendant to show a want of it to diminish them; and the waiving of the right by the one, is no reason why it should be taken from the other. * * *[6]

CHELLIS v. CHAPMAN.

(Court of Appeals of New York, 1891. 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.)

GRAY, J.[7] * * * Evidence of the defendant's general reputation as to wealth, at the time of the agreement of marriage, was admitted against the objection to its competency upon the subject of damages in such an action. * * * Such evidence, on first consideration, seems to conflict with the general rule that in actions for a breach of contract evidence as to the defendant's wealth is inadmissible. The plaintiff, in such actions, is entitled to recover only those damages which she may prove that she has suffered in consequence of the defendant's failure to perform on his part. The defendant's solvency, or insolvency, has nothing to do with the issue, and furnishes no meas-

[5] Part of the opinion is omitted.

[6] See, also, Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88 (1843); Storey v. Early, 86 Ill. 461 (1877); Palmer v. Haskins, 28 Barb. (N. Y.) 90 (1858); Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303 (1875); Draper v. Baker, ante, p. 78.

[7] Part of the opinion is omitted.

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ure for the computation of damages. And this rule of exclusion as to such evidence has been also applied to cases where damages are sought to be recovered for seduction, or for criminal conversation. James v. Biddington, 6 Car. & P. 589; Dain v. Wycoff, 7 N. Y. 191. Baron Alderson, in James v. Biddington, an action by a husband for criminal conversation with his wife, assigned as the reason for holding such evidence to be improper that "the plaintiff is entitled to as much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the case." Judge Gardiner, in Dain v. Wycoff, an action by a father for the seduction of his daughter, reasoned, upon the exclusion of proof of what defendant was worth, that the jury should not be allowed "to go beyond the issue between the parties litigating, and, after indemnifying the plaintiff for the injury sustained by him, proceed as conservators of the public morals to punish the defendant in a private action for an offense against society."

The principle underlying the exclusion of this kind of evidence, in the latter class of cases, is that vindictive or punitive damages would be improper, as the recovery in them should be confined to what the jury may deem to be a sufficient compensation for the injury sustained by the plaintiff. But the present action is quite other in its nature, and constitutes an exception to that general rule upon the subject of damages for violation of contract obligations which has been assented to by the judges of the courts in this country and in England. It is apparent that, in such an action as this, there can be no hard and fast rule of damages, and that they must be left to the discretion of the jury. Of course, that discretion is not so absolute as to be independent of a consideration of the evidence. It is one which is to be exercised with regard to all the circumstances of the particular case, and, as it has frequently been said, where the verdict has not been influenced by prejudice, passion, or corruption, the verdict will not be disturbed by the court. That the amount of the suitor's pecuniary means is a factor of some importance in the case of a demand of marriage cannot fairly be denied. It is a circumstance which very frequently must have its particular influence upon the mind of the woman in determining the question of consent or refusal; and, as I think, in a proper case, very naturally and properly so. The ability of the man to support her in comfort, and the station in life which marriage with him holds forth, are matters which may be weighed in connection with an agreement to marry.

In the case at bar the plaintiff was 47 years of age, and the defendant 74. Six years previously he had sought her acquaintance, unsolicited by her, and with matrimonial views on his part. He had visited her more or less frequently, and had twice proposed marriage before their engagement in 1886. She was and had been supporting herself as a teacher and superintendent in city schools. He had never been married, and had lived in the country as a farmer. He was pos-

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sessed of pecuniary means, considerable in amount in the general estimation of his neighbors, and not inconsiderable if we take his own estimate. Though pretending to some cultivation of mind, which, among other ways, if we may judge from this record, he seemed to delight in displaying by a versification of the homely though not very inspiring or romantic topics and events of his farm life and surroundings, he yet was seemingly lacking in those outward graces of the person which are not infrequently deemed a substitute for more solid possessions. Nor does he seem to have had recourse to the adventitious aids of the wardrobe to adorn his exterior person, and thereby to compensate for personal shortcomings. I think that the jury should be made aware of all the circumstances which in this case, and in every such case, might be supposed to have presented themselves to the mind of the plaintiff when asked to change her position by marriage. Of these circumstances, the home offered, which for its comforts and ease would depend upon the more or less ample pecuniary means of the defendant, the freedom from the personal exertions for daily support, the social position accompanying the marriage, all these are facts which have their proper bearing upon the question of marriage. The wealth and the reputation for wealth of a man are matters which, as this world is constituted, often aid in determining his social position, notwithstanding he may have other and more intelligible rights to it, and despite objectionable characteristics or traits. Where, therefore, the defendant has demanded an engagement of marriage, it seems proper enough that the jury should know what possible reinforcement his suit may have had, and what were the inducements offered by his social standing and surroundings. In the case of James v. Biddington, supra, Baron Alderson, while holding it improper to give evidence of the amount of defendant's property in an action for criminal conversation, said: "In a case of breach of promise of marriage, the amount of the defendant's property is very material, as showing what would have been the station of the plaintiff in society if the defendant had not broken his promise." * * *

Assuming that the amount of defendant's property is material in such an action, then evidence of the reputation which he enjoys for wealth is unobjectionable. Reputation is the common knowledge of the community, and, if it is exaggerated or incorrect, the defendant has the opportunity to correct it, and of giving the exact facts upon the trial. The admission of the evidence is not to establish an ability to pay, but to show the social standing which defendant's means did, or might, command. * * *

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PART VI.

DAMAGES IN CERTAIN SPECIFIC ACTIONS.

CHAPTER I.

IN CERTAIN TORT ACTIONS.

SECTION 1.—AFFECTING THE PERSON.

ROSS v. LEGGETT.

(Supreme Court of Michigan, 1886. 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608.)

The plaintiff was arrested without warrant by order of the defendant, and, after being searched, was imprisoned over night and until 11 o'clock the following morning, when he was charged with maliciously injuring personal property of the company of which the defendant was president "to the damage of six dollars." The plaintiff was subsequently discharged. He obtained below a verdict for $1,500 for damages for the false imprisonment.

SHERWOOD, J.[1] * * * Upon the subject of damages the court charged the jury: "There are two kinds of damages. The law has divided them into two classes. * * * In the first place, there are what are called 'actual' damages. Then there are what are called 'vindictive' or 'punitory' damages, or what our own Supreme Court calls 'added' damages, for want of a better name. Actual damages are such compensation for the injury as would follow from the nature and character of the act. Actual damages, in this case, would be compensation for such injuries as would fall upon any man who underwent the same treatment which Mr. Ross is shown to have undergone in this case. What are those damages? What are the elements? There is the pain and suffering which any man would be supposed—which the average citizen would be supposed—to suffer under those circumstances. There is being shut up—the physical discomfort. There is the sense of shame, mortification, wrong, and outrage. All these mat-

[1] Part of the opinion is omitted.

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ters enter into the actual damages. You are to view Mr. Ross as you would any other man in that regard. You are to be guided in that matter by your common sense, because there is no other rule. There is no other way of getting at it. Your common sense is to determine what naturally and inevitably would be the suffering of the average citizen under such circumstances; because the law will not allow your feelings to be harrowed, will not allow you to be put to shame and mortification. In the eye of the law, those attributes of manhood—those sentiments, those sensitivenesses, so to speak—which come from the better quality of our nature, are matters which are not to be trifled with, any more than a man's bones or his flesh. All these things the law considers precious. All these things the law considers as subjects of injury, and for injuries of this kind the law gives compensation. What would the average man naturally suffer, under those circumstances, from this imprisonment—from what took place—from what Mr. Ross was subjected to that night? What the average man would suffer under those circumstances would be the actual damage. But, beyond actual damages, the law gives what are called 'added' damages. Those grow out of the wantonness or atrocity, so to speak, of the act." * * *

We think this charge is within the rule best supported by the authorities, and within the spirit of the decisions, so far as any have been made in the court, inasmuch as the arrest was clearly without authority. * * *

The jury, by their verdict, found the defendant guilty of the unlawful acts and trespasses to the person and feelings of the plaintiff complained of in his declaration, and if the wrongs inflicted by such unlawful acts were not intended, the lack of such intention could not prevent the pain and suffering experienced by the plaintiff by his false imprisonment, or prevent the physical discomfort—the sense of shame, mortification, outrage, and disgrace—inflicted upon and endured by the plaintiff; and, if so, they were but the natural consequences of the injury the plaintiff received by the treatment of the defendant, and they were all elements to be taken in consideration by the jury in determining the actual damages, and no error was committed by the court in so charging the jury. It is no objection to this view that the same elements, or some of them, must be considered in fixing the amount of exemplary damages, when such are given. * * *

RICHMOND GAS CO. v. BAKER.

(Supreme Court of Indiana, 1897. 146 Ind. 600; 45 N. E. 1049, 36 L. R. A. 683.)

The plaintiff, aged 85 years, brought this action to recover damages for personal injuries caused by an explosion of artificial gas in her home, occasioned by the negligence of the defendant company. A verdict of $4,600 was awarded.

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HOWARD, J.[2] * * * Upon the subject of damages the court gave to the jury two instructions, the first of which is admitted to be correct, and the second of which is complained of by appellant as being erroneous. The two instructions are as follows:

"No. 15. If you find a verdict for the plaintiff, you should award her a sum sufficient to fairly compensate her for all damages, if any, that it is shown, by a fair preponderance of the evidence, she has sustained. In estimating such damages, you should consider the nature and extent of her physical injuries, if any, whether permanent or otherwise; the effect produced thereby, and the probable effect that such injuries will directly produce, if any, upon her general health, and all physical pain and suffering occasioned thereby; expenses incurred for medical attention, if any, shown by the evidence. And if you find from the evidence that she has sustained any permanent disability, having considered the nature of the same, you may award her such prospective damages on account thereof as in your opinion the evidence may warrant you in believing she will sustain, if any, as the direct result thereof in the future. And you have the right, in fixing her damages, to consider her present age, and the probable duration of her life.

"No. 16. If, as a direct result of the injuries, if any, received by the plaintiff, her expectancy of life has been shortened, this circumstance may be taken into consideration by the jury, should they find a verdict in her favor, in estimating the damages, if any, that they may award to her; and on this point the jury may consider all facts, proved by a fair preponderance of the evidence, as to the plaintiff's physical condition, health, vigor, activity, and the daily work done by her, prior to the said explosion."

The first charge above given is full and complete, covering every element of damage suggested by the evidence, unless it should be damages for the shortening of life, as referred to in the second charge. It is as to this question that counsel differ. Counsel for appellant contend that instruction No. 16 is erroneous, for the reason that this is a common-law action, and the common law does not admit of compensation in money for the taking of human life, or the shortening of its duration. * * *

In an action for injury by the wrong of another the actual condition of the injured person, as caused by the accident, may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. And, if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered, in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or short-

[2] Part of the opinion is omitted, and the statement of facts is rewritten.

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ening of his own life. And, if any one else could maintain an action for the death of the injured person, it must be because the person bringing such action would be able to show pecuniary loss or damage to himself by reason of the death of such other person. Of that nature are various statutory actions authorized to be brought by, or for the benefit of, persons regarded as having a pecuniary interest in the lives of others. * * *[3] Reversed.

IRWIN v. DEARMAN.

(Court of King's Bench, 1809. 11 East, 23.)

This was an action on the case for damages, charged in one count to be, for debauching and getting with child the adopted daughter and servant of the plaintiff, by which he lost her service, and, in another count, for debauching his servant, generally, per quod, etc.; and the defendant having suffered judgment by default, a writ of inquiry was executed before the sheriff of Middlesex, when it appeared in evidence that the plaintiff, an officer in the army, had taken charge of the infant daughter of a deceased soldier in the regiment, who had been a friend and comrade of his, which daughter he had bred up for several years in his house, where she was performing the offices of a menial servant (being the only one he kept) at the time she was debauched by the defendant. The only actual damage proved by the plaintiff was the loss of the young woman's service for five weeks, during the time of her absence in the parish workhouse, where she lay in; the expense of her lying in having been paid by the defendant. But the jury under these circumstances gave £100. damages.

Motion for rule to set verdict aside.

Lord ELLENBOROUGH, C. J. This has always been considered as an action sui generis, where a person standing in the relation of a parent, or in loco parentis, is permitted to recover damages for an injury of this nature ultra the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of Edmondson v. Machell, 2 Term Rep. 4, to extend to an aunt, as one standing in loco parentis, I think that this plaintiff, who had adopted

[3] See, also, Welch v. Ware, 32 Mich. 77 (1875), ante, p. 68; Lucas v. Flinn, 35 Iowa, 9 (1872), ante, p. 79; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12 (1882), ante, p. 97; Hewlett v. George, ante, p. 475; Ransom v. N. Y. & E. R. R. Co., 15 N. Y. 415 (1857); R. & D. R. Co. v. Allison, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43 (1890), ante, p. 274; L. & N. R. R. Co. v. Wallace, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548 (1891), ante, p. 416; Goodhart v. P. R. Co., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705 (1896), ante, p. 439; and the cases under the headings "Physical Pain," "Mental Suffering," and "Discretionary Damages."

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and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him aggravated by the injury done to the object on whom he had thus placed his affection.

Rule refused.[5]

KENDRICK v. McCRARY.

(Supreme Court of Georgia, 1852. 11 Ga. 603.)

LUMPKIN, J.[6] * * * This was an action of trespass on the case, instituted in the superior court of Stewart county, by Isaac McCrary against John B. Kendrick, for the seduction of plaintiff's daughter. The jury returned a verdict for $1,049; and a new trial is asked, on the grounds that the daughter was twenty-one years old at the time the injury occurred, and there was no contract of service between her and her father; that the service rendered was voluntary. And it is contended that the father could not sue for, and recover damages, for the loss of that which he had no legal right to claim; that the measure of damages was the actual loss sustained; and that the right of action belonged to the daughter and not to the father.

In cases of this sort, it is not necessary to prove an actual contract between the father and the daughter, in order to maintain the action. Before the child attains the age of twenty-one, the law gives the father dominion over her; and after, the law presumes the contract, when the daughter is so situated as to render service to the father, or is under his control; and this it does for the wisest and most benevolent of purposes, to preserve his domestic peace, by guarding from the spoiler the purity and innocence of his child. Bennett v. Alcot, 2 Term R. 166; Nickleson v. Styker, 10 Johns. (N. Y.) 115, 6 Am. Dec. 318; Moran v. Dawes, 4 Cow. (N. Y.) 412; Mainoter v. Nin, M. & M. 323, cited 3 Stephens' N. P.; Hollaway v. Abell, 32 Eng. Com. L. R. 615. In the case before us, the daughter lived in her father's house at the time of the seduction, under his control, and in the performance of actual services.

This action was originally given to the master, to enable him to recover damages for the loss of service occasioned by the seduction of his servant. He was restricted in his recovery to the actual damages sustained. The loss of service is still the legal foundation of the action; and the father cannot maintain the action without averring in his declaration and proving on the trial, that from the consequences of the seduction, his daughter is less able to perform the duties of servant; but the proof upon both of these points need be very slight. It matters

[5] See, also, Terry v. Hutchinson, L. R. 3 Q. B. 599 (1868); Andrews v. Askey, 8 Car. & P. 7 (1837); Elliott v. Nicklin, 5 Price, 641 (1818); Bedford v. McKowl, 3 Esp. 119 (1800).

[6] Part of the opinion is omitted.

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not how small the service she rendered, though it may have consisted in milking his cows, or even pouring out his tea, he is entitled to his action. Carr v. Clark, 2 Chitty, 261; Mann v. Barrett, 6 Esp. 23. Indeed, as shewn by the cases cited under the other head, it has been decided, that the father need not prove any actual service rendered, if at the time of the seduction, she lives with her father, or is under his control; and that too, whether she be a minor or an adult. Lord Denman held, in Joseph v. Cowan (cited 2 Stephens' N. P. 2354, and Roscoe on Ev. 493), that the father can maintain the action before the confinement of his daughter, and even though he has turned her out of doors.

As to the measure of damages, the rule originally governing the action, has for a long time been so far extended as to authorize the father to recover damage beyond the mere loss of services and expenses consequent on the seduction.

Lord Ellenborough, in the case of Irwin v. Dearman, 1 East, 24, says: "However difficult it may be to reconcile to principle the giving of greater damages, the practice is become inveterate, and cannot now be shaken." In Tulledge v. Wade, 3 Wils. 18, Chief Justice Wilmot remarks: "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case, may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages." The court, in Tillotson v. Cheatham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459, quoting the foregoing cases with approbation, adds: "The actual pecuniary damages, in actions for defamation, as well as in other actions for loss, can rarely be computed, and are never the sole rule of assessment."

In Briggs v. Evans, 27 N. C. 16, and upon which I have already drawn, the Supreme Court of North Carolina use this strong language: "The second exception is equally as untenable as the first. It assumes that the only consequential injury to the father, of which he has a right to complain, consists in the loss of the services of his daughter, and the expenses he may incur during her confinement. This certainly is not so. If it were so, and pregnancy did not result from the seduction, the father would have no action. All the authorities show that the relation of master and servant, between the parent and child, is but a figment of the law, to open to him the door for the redress of his injuries. It is the substratum on which the action is built; the actual damage which he has sustained, in many, if not in most cases, exists only in the humanity of the law, which seeks to vindicate his outraged feelings. He comes into the court as a master, he goes before the jury as a father." * * *

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OSMUN v. WINTERS.

(Supreme Court of Oregon, 1894. 25 Or. 260, 35 Pac. 250.)

See ante, p. 81, for a report of the case.[7]

LONG v. BOOE.

(Supreme Court of Alabama, 1895. 106 Ala. 570, 17 South. 716.)

McCLELLAN, J.[8] * * * In actions for criminal conversation, prosecuted by a husband for the defilement of his wife, it is usual to claim damages for the loss of the wife's services. That claim is made in this case. There was evidence that plaintiff and his wife had been living together as man and wife for two or three weeks before the trial. There was no evidence of the value of the wife's services, or the pecuniary loss to the plaintiff from a deprivation of her services during the period they had lived apart in consequence of her relations with the defendant. Upon this state of case, the defendant requested the court to charge the jury (2) that the plaintiff was not entitled to recover any damages "for the loss of the association and services of his wife" for the two or three weeks just before the trial, during which they had been living together as husband and wife; and, further (charge 3), that if the jury believe the evidence "they cannot find any damages for any loss of services of his, plaintiff's, wife alleged to have been caused by the alleged wrongs of the defendant." These requests proceed upon a mistaken idea as to what the term "services" means in this class of actions. It does not mean labor performed. It does not necessarily mean assistance in any material sense.

The deprivation of services in this connection does not necessarily or ordinarily involve or imply a loss measurable by pecuniary standards of value, such as obtain where the master is deprived of the labor of his servant, or even where the father is deprived of the help of his daughter. But the term, as employed here, is, as said by Judge Cooley, "used in a peculiar sense, and fails to express to the common mind the exact legal idea intended by it. Whatever may have been the case formerly," he continues, "or may now be the case in some states of society, services in the sense of labor or assistance, such as a servant might perform or render, are not always given by or expected from the wife; and, if an action were to put distinctly in issue the loss of such services, it might perhaps be shown in the most serious cases that there was really no loss at all. But it could not be reasonable

[7] See, also, Burnett v. Simpkins, ante, p. 141; Berry v. Da Costa, post, p. 604; Clem v. Holmes, 33 Grat. (Va.) 722, 36 Am. Rep. 793 (1880); Wilhoit v. Hancock, 5 Bush (Ky.) 567 (1869); Ball v. Bruce, 21 Ill. 161 (1859).

[8] Part of the opinion is omitted.

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that the wrongdoer should escape responsibility because the family he has wronged were in such circumstances, moved in such circles, or were subject to such claims, by reason of public position or otherwise, that physical labor by the wife was neither expected nor desired. The word 'service' has come to us in this connection from the times in which the action originated, and it implies whatever of aid, assistance, comfort, and society the wife would be expected to render or to bestow upon her husband, under the circumstances and in the condition in which they may be placed, whatever those may be. That services in the ordinary sense were not rendered at all would be immaterial and irrelevant, except as the fact might, under some circumstances, tend to show a want of conjugal regard and affection, and thereby tend to mitigate the damages." Cooley, Torts, p. 226. And to like effect is the language of the Supreme Court of Massachusetts: "A husband is not master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word 'consortium'—the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation. * * * A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance." Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

Again, it is said: "The damages allowed in suits for criminal conversation are penal rather than compensatory, for the plaintiff is entitled to substantial damages, though he prove no resulting expense or loss of society or services." 9 Am. & Eng. Enc. Law, p. 835. And the theory that the injury wrought by the wrongdoer in such cases to the husband is an injury to his feelings, his comfort, his pride, his affections, and to his conjugal rather than his property rights, and is to be measured by standards which take no account of the loss inflicted upon his estate by the deprivation of services to the results of which he is entitled, is illustrated and has been fully recognized by this court in Garrison v. Burden, 40 Ala. 513, where it is held that this is an action "for injuries to the person or reputation" of the plaintiff, and for that reason does not survive the death of the wrongdoer, under section 2600 of the Code. The manifest purpose of the charges in question was, and their effect would have been, to confine the jury, in their assessment of damages, to a consideration of services as labor or assistance such as a servant might perform or render; and they were, therefore, properly refused. * * *[9]

[9] See, also, Palmer v. Crook, ante, p. 143; Wilton v. Webster, 7 Car. & P. 198 (1835); Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307 (1883); Matheis v. Mazet, 164 Pa. 580, 30 Atl. 434 (1894); Williams v. Williams, 20 Colo. 51, 37 Pac. 614 (1894).

For the measure of damages in slander and libel cases, re-read Farrand v. Aldrich, ante, p. 79; Sickra v. Small, ante, p. 136; Swift v. Dickerman, ante, p. 139; Mahoney v. Belford, ante, p. 476, note; Georgia v. Kepford, ante, p.

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DENVER & R. G. R. CO. v. SPENCER et al.

(Supreme Court of Colorado, 1900. 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.)

This action was commenced by the appellees to recover damages for the death of their father, caused by the alleged negligence of the appellant.

GABBERT, J.[10] * * * The verdict was in the sum of $4,000, which appellant contends is excessive. The right of appellees to maintain this action is purely statutory. It did not exist at common law. The damages which they are entitled to recover must be limited to those of a compensatory character—in other words, to such pecuniary damages as they have sustained by reason of the death of their father. As aptly stated by the late Justice Elliott in Pierce v. Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of defendant; * * * but it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law." At the time of his death his wife was living, and survived him about two years. The appellees were in no manner dependent upon him for support. The mere relationship between them and deceased cannot be made the basis of a recovery in this case, however much they may have grieved over his untimely death. Therefore, as stated in the former opinion in this case, "the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life." Or, under the evidence, their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses, and those of his wife during her life, would have added to his estate, and which would have descended to the appellees, as his heirs at law. The court so instructed the jury.

Was this instruction followed? At the time of his death, deceased

164; Callahan v. Ingram, ante, p. 138, note; Lynch v. Knight, ante, p. 446; Newman v. Stein, ante, p. 138, note; Hotchkiss v. Oliphant, ante, p. 143; Prime v. Eastwood, ante, p. 475; Bennett v. Hyde, ante, p. 482.

As to what words are actionable per se, see Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308 (1875). As to recovery for mental suffering arising from slander, see Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420 (1858); Prime v. Eastwood, 45 Iowa, 640 (1877), ante, p. 475. For general measure of damages, see Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611 (1896).

[10] Part of the opinion is omitted.

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was upward of 68 years of age. His expectancy of life was about 9½ years. There is testimony to the effect that at the time of his death his annual income, arising from his personal exertions, after deducting his personal expenses, equaled the sum of about $1,000 per annum, although the evidence is not entirely satisfactory upon this point, for the reason that the witness testifying on this subject was not certain that he was fully advised regarding the personal expenditures of the father. The money earned by deceased from this source consisted of a salary of $1,500 per annum as an employé of a bank, and about $500 more per annum, earned as a conveyancer and notary, in connection with his bank duties. He had considerable income from investments, but this cannot be considered, in estimating his annual savings. We mention this, however, because it appears that his net worth at the time of his death could not have been so very much in excess of the value of his bank stock, which was $6,400, because it appears that his other investments were incumbered in such an amount that, after deducting interest, there was but little left in the way of income from these sources, after payment of taxes. Had he lived the full term of his expectancy, and during that period been able at all times to continue to engage in the work in which he was employed at the time of his death, his net personal earnings would have exceeded much more than the damages awarded.

It cannot be fairly assumed, however, or expected, that, at his advanced age, he would have continued to labor during all the future years of his life. In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reason of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employé in the bank, in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years. All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss. Diebold v. Sharp, 19 Ind. App. 474, 49 N. E. 837.

Except for the statute, appellees could not maintain this action. Its provisions are beneficent, but limited. In no case under it can damages exceed the sum of $5,000. Taking into consideration the evidence upon which the award of damages is based in this case, the contingencies to which we have directed attention, the improbability that deceased, during the remaining years of his life, would have saved from net personal earnings a sum anywhere nearly approximat-

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ing the damages awarded, and the disproportion of that sum to his previous accumulations, it is evident that the jurors certainly failed to consider the instructions of the court on the subject of damages, but must have been influenced by considerations other than those which the law recognizes as elements of damages in such cases. * * *[11]

SAN ANTONIO & A. P. RY. CO. v. LONG et al.

(Supreme Court of Texas, 1894. 87 Tex. 148, 27 S. W. 113, 24 L. R. A. 637, 47 Am. St. Rep. 87.)

GAINES, J.[12] The plaintiffs in the trial court (the defendants in error in this court) are the sons and daughters of Mrs. M. C. Long. They brought this suit, under the statute, to recover damages for injuries resulting to them from the death of their mother. * * * The deceased left surviving her neither father nor mother, and that the plaintiffs (two sons and four daughters) were her only children; the deceased mother, at the time of her death, had property amounting in value to $18,500; and that the income of her property was about $1,850. All of this except about $250, which was used in her own support, she devoted to the assistance of her children. * * *

Such being the evidence adduced by the plaintiffs upon the question of the amount of damages, the defendant offered in evidence the will of Mrs. M. C. Long, duly probated, in which she devised and bequeathed all of her estate to her four daughters. To the reading of the will in evidence, the plaintiffs objected, and their objection was sustained, and the evidence excluded. This action of the court raises the serious question in this case, and it is one which is of first impression in this court. In an action for injuries resulting in death, can the defendant show, for the purpose of reducing the damages, that the plaintiffs have received, by devise or descent, property from the estate of the deceased? If such evidence be admissible in any case of like character, it was certainly admissible in this case. The authorities are not numerous, and the expressions of the courts are in an apparent conflict upon the question.

Among the cases relied upon in support of the negative is that of Railroad Co. v. Barron, 5 Wall. 90, 18 L. Ed. 591. The defendant asked the court to charge the jury "that if the persons for whose benefit this action is brought have received, in consequence of the death of said Barron, and out of his estate inherited by them from him, a pecuniary benefit greater than the amount of damages which could, under any circumstances, be recovered in this action, then, as a matter of

[11] Baker v. Bolton, 1 Camp. 493 (1808) is the leading case holding that at common law there was no recovery for the death of a human being. This is still the rule in England in so far as Lord Campbell's act is not applicable. Osborn v. Gillett, L. R. 8 Exch. 88 (1873).

[12] Part of the opinion is omitted.

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law, they have, by the death of said Barron, sustained no actual injury for which compensation can be recovered in this action." Upon error to the Supreme Court of the United States, that court held, in effect, that the charge was properly refused. The trial court had, however, charged the jury, among other things, as follows: "In this case the next of kin are the parties who are interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them. The jury have the right, in estimating the pecuniary injury, to take into consideration all the circumstances attending the death of Barron —the relations between him and his next of kin, the amount of his property, the character of his business, the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had. There is a possibility, in chances of business, that Barron's estate might have decreased, rather than increased, and this possibility the jury may consider. The jury may also take into consideration that he might have married, and his property descended in another channel. And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation which the widow, if any, or the next of kin, might sustain by the death of the party; and the jury are to determine, as men of experience and observation, from the proof, what that loss is." It is apparent, we think, that evidence had been admitted of property received by inheritances by the beneficiaries from the estate of the deceased, and the case cannot be considered as a decision upon the question of the admissibility of such evidence. * * *

It must, however, be conceded that the decisions of some of the courts upon similar statutes recognize the rights of minor children, at least, to recover for the loss of individual pecuniary benefits which would probably have inured to them by the continuance of the life of their parent. Tilley v. Railroad Co., 24 N. Y. 471, 29 N. Y. 252, 86 Am. Dec. 297; Terry v. Jewett, 78 N. Y. 338. Under the statutes of New York, the recovery is for the benefit of the next of kin, and is to be there also apportioned as under the statute of descent and distribution. It is worthy of remark that under such a statute the recovery may go to remote collateral kindred, who have no interest whatever in the life of their relative, except the prospective shares they may receive, as distributees of his estate, upon his dying intestate. Where such is the loss to be recompensed, it is no answer to the plaintiff's demand to say to him that he has not been damaged, because he has received a pecuniary benefit from the death of the deceased. His ground of complaint is not that he has been deprived of receiving anything, but that the amount which has come to him is less than it would have been if the life of the deceased had been prolonged.

There would seem to be an important difference between statutes

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which give the right of action to the next of kin, as such, and the statute of this state which undertakes to confer compensation upon the husband or wife and the children and parents of the deceased only, and which requires that the jury shall determine separately the amount to be recovered by each of the beneficiaries. Where the right of action is given for the benefit of the next of kin, and the sum recovered is to be apportioned as under the statute of descent and distribution, it would seem that the leading purpose is to give compensation for some loss suffered by them all in common; that is to say, the damage which has accrued to them, as next of kin, by reason of the loss of a prospective increase in the amount of the estate to be distributed. Our statute excludes from its benefits the collateral kindred, and its leading purpose seems to be to compensate only such near relatives of the deceased as may be dependent upon him for support, or other aid of pecuniary value, or such as may have been the recipients of such aid or support. It may be that, in statutes of the one class, special injury to one beneficiary may be considered and compensated, though it is difficult to see why the recovery for such loss should be distributed in a fixed proportion among all; and it may be, also, that under our statute the loss of a prospective increase of inheritance may be an element of damages. But, under the latter, each beneficiary recovers for his own special injury. The damages must be actual, and for loss of a pecuniary nature. Nothing is given by way of solace. Under such a law, we cannot see how it can be maintained that one has been damaged by the death when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him, had the death not ensued. * * *

The English statute known as "Lord Campbell's Act," upon which most, if not all, of the statutes of a like character in this country have been modeled, is, in respect to the beneficiaries, very nearly the same as the statute in this state. The action is for the benefit of "the husband, wife, parent and child" of the deceased, and the jury are to apportion the damages among the beneficiaries. The only substantial difference is that Lord Campbell's act provides that under the term "parents" shall be included "grandparents." In an action brought under that act, Lord Campbell himself, who presided at the trial, instructed the jury that in assessing the damages they should take into consideration the amount received by the beneficiaries on an accident insurance policy held by the deceased. * * *

Statutes giving damages for injuries resulting in death necessarily deal with probabilities; so that where there is a policy on the life of the deceased, payable to the beneficiaries under the statute, the probability is, or may be, that, if the deceased had continued to live, beneficiaries would ultimately have received the insurance money. Hence, they have gained nothing by the premature death, except an acceleration of the payment. Perhaps sound principles would require the jury to take into consideration the use of the money during the period of ac-

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celeration. * * * But, however that may be, the case is very different where the only aid which the beneficiaries have received from the deceased, during his life, has been a part of the income of his property, and where, upon his death, the title to the corpus of such property absolutely vests in them; and we are therefore of the opinion that, in a case involving similar facts, they should be admitted in evidence, to be considered by the jury. We conclude that the court erred in excluding the will of Mrs. Long, and that for this error the judgment must be reversed. * * *[13]

MORGAN v. SOUTHERN PAC. CO.

(Supreme Court of California, 1892. 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143.)

Action by Flora Morgan against the Southern Pacific Company to recover damages for the death of her child caused by defendant's negligence. The jury gave her damages in the amount of $20,000.

McFARLAND, J.[14] * * * There was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars;" and there was no evidence whatever introduced or offered upon the subject of damage. The jury, therefore, had nothing before them upon which to base damages except the naked fact of the death of a female child two years old; and it is apparent, at first blush, that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her, by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a solatium for wounded feelings. * * *

[13] See, also, Terry v. Jewett, ante, p. 405, note.

[14] Part of the opinion is omitted.

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Beeson v. Mining Co., 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; * * * but, in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured or at least considered from a pecuniary standpoint. * * * If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording solace in money, but for the purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case where the same rule was applied to the loss of a wife, the court saying that "certainly the service of a wife is pecuniarily more valuable than that of a mere hireling." The Beeson Case, therefore, does not decide that the jury may depart from a pecuniary standpoint in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated. * * *

In the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given wide range to run into any wild and excessive verdict which their caprice might suggest. We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred. * * * Reversed.

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DEMAREST et al. v. LITTLE.

(Supreme Court of New Jersey, 1885. 47 N. J. Law, 28.)

MAGIE, J.[15] This action was brought to recover damages for the death of plaintiff's testator. * * * The case was first tried in 1883, and a verdict rendered for plaintiffs, assessing their damages at $30,000. This verdict was afterwards set aside upon a rule to show cause. * * * The case has been again tried, and the verdict has been again rendered for plaintiffs, assessing their damages at $27,500. * * *

The action is created by statute, which supplies the sole measure of the damages recoverable therein. They are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death. The injury to be thus recovered for has been defined by this court to be "the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of deceased." Paulmier v. Railroad Co., 34 N. J. Law, 151. Compensation for such deprivation is therefore the sole measure of damage in such cases. * * *

Deceased left no widow, and but three children. All of them had reached maturity. Two sons were self-supporting; the daughter was married. He owed no present duty of support, and there is nothing to show any fixed allowance or even casual benefactions to them. They are therefore deprived of no immediate pecuniary advantage derivable from him. At his death he was in business, in partnership with his sons and son-in-law. All the partners gave attention to the business and the capital was furnished by deceased. His death dissolved the partnership and deprived the surviving partners of such benefit as they had derived from his credit, capital, skill and reputation. But the injury thus resulting is not within the scope of this statute, which gives damages for injuries resulting from the severance of a relation of kinship and not of contract. No damages could be awarded on that ground.

Defendants strenuously urge that, outside of the partnership or in the event of its dissolution, the next of kin had a reasonable expectation of deriving from the parental relation an advantage by way of services rendered or counsel given by deceased in their affairs. A claim of this sort must be carefully restricted within the limits of the statute. The counsels of a father may, in a moral point of view, be of inestimable value. The confidential intercourse between parent and child may be prized beyond measure, and its deprivation may be productive of the keenest pain. But the legislature has not seen fit to permit recovery for such injuries. It has restricted recovery to the pecuniary injury; that is, the loss of something having pecuniary value.

[15] Part of the opinion is omitted.

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Now, it may with some reason be anticipated that a father, out of love and affection, might, if circumstances rendered it proper, perform gratuitous service for a child, which by rendering unnecessary the employment of a paid servant, would be of pecuniary value, and that he might, by advice in respect to business affairs, be of a possible pecuniary benefit. But whether such an anticipation is reasonable or not must depend on the circumstances. Considering the age, the assured position, the business and other relations of these children, it is obvious that the probability of any pecuniary advantage to accrue to them in these modes was very small. Indeed, it would not be too much to say that resort must be had to speculation to discover any such advantage. At all events, compensation for this injury in this case could not exceed a small sum without being excessive.

The principal basis for plaintiff's claim is obviously this: That the death of deceased put an end to accumulations which he might have thereafter made and which might have come to the next of kin. Deceased had accumluated about $70,000, all of which, except $10,000 capital invested in the business, seems to have been placed in real estate and securities as if for permanent investment. By his will the bulk of his property was given to his children. At his death he had no other sources of income than his investments and his business.

In determining the probability of accumulations by deceased if he had continued in life, no account should be taken of the income derivable from his investments. These have come in bulk to the children, who may, if they choose, accumulate such income. A deprivation of the probability of his accumulating therefrom is no pecuniary injury. On the contrary, it is rather a benefit to them to receive at once the whole fund in lieu of the mere contingency or probability of receiving it, though with its accumulations (at best uncertain), in the future. Indeed, the benefit thus accruing to the next of kin in receiving at once this whole property, in the view of one of the court, is at least equivalent to the present value of the probability of their receiving it hereafter, if deceased had continued in life, with all his probable future accumulations from any source whatever, in which case it is evident that his death has not resulted in any pecuniary injury to them. But without adopting this view of the evidence, it is plain that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business. His receipts from the business for the two years it had been conducted were proved. What he expected was not proved, but left to be inferred for his mode of life. At death he was about fifty-six and a half years old, and by the proofs had an expectation of life of sixteen and seven-tenths years.

From these facts the jury were to find what deceased would probably have accumulated, what probability there was that his next of kin would have received his accumulations, and then what sum in hand would compensate them for being deprived of that probability. In

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what manner the jury attempted to solve this problem we cannot ascertain. Plaintiffs' counsel attempts to show the correctness of the result reached, by calculation. He assumes the income of deceased from his business during the last year as the annual income likely to be obtained, and deducts only $1,000 each year as the probable expenditure of deceased, and then finds the present worth of the net income so determined for the deceased's expectation of life is $27,710.32.

This calculation tests the propriety of this verdict, and in my judgment conclusively shows that it was rather the result of sympathy or prejudice than a fair deduction from the evidence. For, assuming the amount attributable to the loss of deceased's services was but small (and if more it was excessive), the award of the jury on this account was but a few hundred dollars less than the present worth of the full net income if received for his full expectancy of life. To reach such a result the jury must have found every one of the following contingencies in favor of the next of kin, viz.: That deceased, who had already acquired a competence, would have continued in the toil of business for his full expectancy of life; that he would have retained sufficient health of body and vigor of mind to enable him to do so, and as successfully as before; that he would have been able to avoid the losses incident to business, and would have safely invested his accumulations; and that the next of kin would have received such accumulations at his death. A verdict which attributes no more weight than this has, to the probability that one or more of all these contingencies would happen, cannot have proceeded from a fair consideration of the case made by the evidence. * * *[16]

[16] Pain and suffering undergone by the deceased prior to his death are not proper elements of damage in this action. Dwyer v. C., St. P., M. & O. Ry. Co., 84 Iowa, 479, 51 N. W. 244, 35 Am. St. Rep. 322 (1892).

See, also, Sherlock v. Alling, 44 Ind. 199 (1873); Terry v. Jewett, ante, p. 405, note; Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580 (1877); Grosso v. D., L. & W. R. R. Co., 50 N. J. Law, 317, 13 Atl. 233 (1888); Hyatt v. Adams, 16 Mich. 180 (1867); C. I. Co. v. N. Y. & N. H. R. R Co., 25 Conn. 265, 65 Am. Dec. 571 (1856); Whitford v. P. R. R. Co., 23 N. Y. 465 (1861); Tilley v. N. Y. C. & H. R. R. Co., 24 N. Y. 471 (1862); Etherington v. P., P. & C. I. R. R. Co., 88 N. Y. 641 (1882); Howard Co. v Legg, 93 Ind. 523, 47 Am. Rep. 390 (1884); P. R. R. Co. v. Butler, 57 Pa. 339, 98 Am. Dec. 229 (1868). For English decisions under Lord Campbell's act, see Pym v. Railway Co., 4 Best & S. 403 (1863); Bradburn v. Railway Co., L. R. 10 Exch. 1 (1874), and Railway Co. v. Jennings, L. R. 13 App. Cas. 800 (1888).

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SECTION 2.—AFFECTING PROPERTY.

I. REALTY.

DWIGHT v. ELMIRA, C. & N. R. CO.

(Court of Appeals of New York, 1892. 132 N. Y. 199, 30 N. E. 398.)

PARKER, J.[17] The judgment awards to the plaintiff $503 for damages occasioned by the defendant's negligence in setting on fire and destroying 21 apple trees, 2 cherry trees, and 2½ tons of standing grass, and also injuring 7 apple trees, the property of plaintiff. The only question presented on this appeal is whether the proper measure of damages was adopted on the trial.

A witness called by the plaintiff was asked: "Question. What were those twenty-one trees worth at the time they were killed?" Objection was made that the evidence did not tend to prove the proper measure of damages, but the objection was overruled, and the answer was: "Answer. I should say they were worth fifty dollars apiece." Similar questions were propounded as to the other trees; a like objection interposed; the same ruling made; answers to the same effect, except as to value, given; and appropriate exceptions taken. Testimony was also given, tending to prove that the land burned over by the fire was depreciated in value $30 per acre. The only evidence offered by the plaintiff, touching the question of damages, was of the character already alluded to.

Fruit trees, like those which are the subject of this controversy, have little if any value after being detached from the soil, as the wood cannot be made use of for any practical purpose; but, while connected with the land, they have a producing capacity which adds to the value of the realty. Necessarily the testimony adduced tended to show, not the value of the trees severed from the freehold, but their value as bearing trees, connected with and depending on the soil for the nourishment essential to the growth of fruit. How much was the realty, of which the trees formed a part, damaged, was the result aimed at by the questions and attempted to be secured by the answers. Can the owner of an injured freehold because the trees taken or destroyed happen to be fruit instead of timber trees, have his damages measured in that manner? is the question presented now, for the first time, in this court, so far as we have observed.

Where timber forming part of a forest is fully grown, the value of the trees taken or destroyed can be recovered. In nearly all jurisdictions, this is all that may be recovered; and the reason assigned for it

[17] Part of the opinion is omitted.

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is that the realty has not been damaged, because, the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. 3 Suth. Dam. p. 374; 3 Sedg. Dam. (8th Ed.) p. 45. * * * In this state it is settled that even where full-grown timber is cut or destroyed the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of. Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young, 29 N. Y. 36; Easterbrook v. Railroad Co., 51 Barb. 94. The rule is also applicable to nursery trees grown for market, because they have a value for transplanting. The soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages. 3 Sedg. Dam. (8th Ed.) p. 48; Birket v. Williams, 30 Ill. App. 451. Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages, where it has a value after removal, and the land has sustained no injury because of it.

On the other hand, cases are not wanting where the value of the thing detached from the soil would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land. This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibberd, 6 Cal. 163; Wallace v. Goodall, 18 N. H. 439–456; Hayes v. Railroad Co., 45 Minn. 17–20, 47 N. W. 260. In Wallace's Case, supra, the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees may be valueless. The trees, considered as timber, may from their youth be valueless; and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil." The same rule prevails as to shade trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell, 52 Hun, 353, 5 N. Y. Supp. 248, and cases cited supra. The current of authority is to the effect that fruit trees and ornamental or growing trees are subject to the same rule. * * *

It is apparent from the authorities * * * that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occa-

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sioned by the removal. * * * A party may be content to accept the market value of the thing taken when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury. In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part —as indeed he should not have been, as such value was little or nothing —so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed. * * *

McMAHON v. CITY OF DUBUQUE.

(Supreme Court of Iowa, 1898. 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143.)

See ante, p. 346, for a report of the case.

STOUDENMIRE v. DE BARDELABEN.

(Supreme Court of Alabama, 1888. 85 Ala. 85, 4 South. 723.)

The bill in this case was filed on the 2d June, 1882, by J. D. Stoudenmire, against Warren L. De Bardelaben, and sought an account of waste, alleged to have been committed by the defendant on lands belonging to his wife, Mrs. Caroline W. De Bardelaben, since deceased, who was the mother of the complainant by a former husband. The alleged waste was committed in 1872, on a tract of land which Mrs. De Bardelaben held under the will of her former husband, called the "Home Place," and consisted in the removal of the dwelling house and other buildings thereon to the adjoining lands of said Warren L. Mrs. De Bardelaben died in 1878, and by her last will and testament, which was duly admitted to probate in October, 1878, devised and bequeathed all her property, "real and personal, of every kind and description," to her son, the complainant.[18]

CLOPTON, J.[19] * * * The evidence shows that the houses were removed with the consent, if not by direction, of the wife of de-

[18] The statement is abridged from that of the official report.

[19] Part of the opinion is omitted.

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fendant. It is true the defendant has the benefit of the houses, being located on his land, but this does not of itself make him responsible for the value of the houses, as for a conversion. If removed with her consent, there was no conversion as against the mother of complainant. Evidence of their value may be relevant as affecting the inquiry in regard to the injury done to the land. But should the value of the houses be adopted as the rule of damages the complainant would recover, as shown by the evidence and the report of the register, compensation for the waste committed by their removal, exceeding the entire value of the land with the houses remaining on it; which would be unjust to defendant. Under the circumstances of the case, shown by the evidence, the complainant is not entitled to recover more than the actual damages suffered by the mother, which consists in the injury done the land—its diminution in value—by the removal of the houses; that is, the difference between the market value before and after the houses were removed. Chipman v. Hibberd, 6 Cal. 162; Achey v. Hull, 7 Mich. 423; Clark v. Zeigler, 79 Ala. 346. The register reported that the difference in value, with and without the houses, is, according to the testimony of defendants' witnesses, including interest, $1,621.85, and that complainant offered no testimony as to such difference in value. The chancellor decreed this amount in favor of complainant, and, on a consideration of the entire evidence, his decree appears substantially correct. * * *

JACKSONVILLE, T. & K. W. RY. CO. v. PENINSULAR LAND, TRANSP. & MFG. CO.

(Supreme Court of Florida, 1891. 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65.)

See ante, p. 349, for a report of the case.

BALTIMORE & O. R. CO. v. BOYD.

(Supreme Court of Maryland, 1887. 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.)

The defendant company entered upon and used for several years plaintiff's vacant and unimproved lot as a bed for its railroad track under defective condemnation proceedings. This action is brought for the repeated trespasses.

ALVEY, C. J.[20] * * * The strip of ground belonging to the plaintiffs has been continuously and beneficially occupied by the defendant, as the bed of its railroad tracks, since the death of Philip D. Boyd to the time of bringing the last suit; and for such use of

[20] Part of the opinion is omitted, and the statement of facts is rewritten.

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the land a reasonable, but a substantial, compensation ought to be paid. It is true, there is no evidence whatever of any special damages sustained, or that the plaintiffs were hindered or obstructed in any proposed use of their lot, by reason of the presence and use of the railroad tracks; but, nevertheless, we are of opinion that the plaintiffs are entitled to a reasonable compensation for the use of their land, and we think this is measured by what would be a fair rental value for the ground, occupied as it has been, for the time covered by the actions, and nothing more. In such cases as the present, where there is nothing to show that any special damage has been suffered, the principle seems to be established by many respectable authorities that the plaintiff is entitled to recover such compensation as the use of the ground was worth, during the time and for the purpose it was occupied. It has been so held in several cases, and we need only refer to McWilliams v. Morgan, 75 Ill. 473; City of Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626; Ward v. Warner, 8 Mich. 508. * * *[21]

[21] Finch, J., in Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. 365 (1890): "The parties were adjoining owners, and the defendant, using her building for the storage of ice, caused injury to the plaintiff's dwelling house. The melting of the ice occasioned a dampness which struck through the walls of the dwelling, and, beyond an injury to the structure, made it so unsafe and unfit for occupation as to have seriously diminished its rental value. The plaintiff brought an equitable action so far as the relief demanded was concerned. She asked for an injunction to prevent the continuance of the nuisance, and for damages. Under the defendant's objection and exception, she was allowed to prove the loss of rental value to the time of the trial, and then the cost of repairing the injury done, and putting the dwelling into a condition to be unaffected by the proximity of the ice; and, in addition to that, the permanent depreciation. No instructions were given to the jury limiting or guiding their action upon this evidence, but they were left to determine the damages from the proof given, and in their own way. They rendered a verdict for the plaintiff of $1,000. The court refused to grant an injunction, and gave no equitable relief, but allowed the judgment for damages to stand. That judgment must be reversed for the error in admitting evidence relating to the damages. Although the complaint demanded equitable relief, no case for it was made, and none awarded. The injury complained of was by no means permanent in its character, and resulted from the use of the defendant's building as an ice house, and the melting of the ice therein. She might elect to discontinue that use, and, if equitable relief had been granted, would have had the option to have discontinued the nuisance, and so to have prevented a permanent depreciation of value, or, continuing it, to obtain the right so to do by paying the resulting depreciation, as the court might determine. But on this trial the depreciation was proved without an award of equitable relief, and double damages may have been the consequence of the proof. The rental value to the time of the trial, and, in addition, the sum necessary to repair plaintiff's house, and put it in condition which would prevent future injury from the same cause, were first shown, and their aggregate would cover the total damages possible to be sustained. When to that permanent depreciation is added, damages are given for what cannot occur. The cost of prevention and the result of continuance cannot both be given. The award of the one must necessarily exclude the other."

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FOLSOM v. APPLE RIVER LOG DRIVING CO.

(Supreme Court of Wisconsin, 1877. 41 Wis. 602.)

COLE, J.[22] * * * It appears that the plaintiff owned meadow land lying along the adjacent to Apple river, from which he was accustomed to cut hay. It is alleged that these meadows were overflowed by large quantities of water which were discharged from the dams of the defendant during the season for driving logs, which usually continued from about the middle of May until about the first of July, and the hay and grass thereon were destroyed or injured in value in consequence of such flowage. The plaintiff claimed that he was entitled to recover for such injury the value of the standing grass which was totally destroyed, and the depreciation in the remainder resulting from the flowing. The defendant claimed, and asked the court so to instruct the jury, that if they found from the evidence that the plaintiff's premises were injured and overflowed by the act of the defendant, the measure of damages was the difference between the rental value of the premises had they not been injured, and the rental value with the injury, together with interest on the same. The learned circuit judge adopted the rule as claimed by the plaintiff, as affording the true measure of damages. We think this ruling was correct. The hay was partly grown when injured or destroyed, and it seems to us that the net presumed value of the hay, less its actual value, measured the actual damages sustained. Suppose it had been a crop of wheat nearly ripe: would it be just to allow the plaintiff only the difference between the rental value of the premises uninjured by the flowage and the rental value as they were? Would that give him compensation for his damages? Would he not be entitled to recover the value of the crop standing upon the ground? It seems to us clear that he would be entitled to recover that amount. In this case the plaintiff, a farmer, testified to the number of tons of hay injured or wholly destroyed each year by the flowage, and the actual value of the hay standing upon the ground. It is said that this was resorting to a conjectural method of estimating the damages. But it would seem to be the only way to arrive at the value of the hay destroyed. If the estimate of the witness was extravagant, his testimony could be and in fact was controverted by that on the other side. But that the value of the crops, and not the rental value of the land, was the true rule of damages, is shown by Williams v. Currie, 1 Man., G. & S. 841, Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384, and Seamans v. Smith, 46 Barb. (N. Y.) 320; to which we were referred on the argument. The case of Williams v. Currie was an action of trespass by a tenant against the landlord for damages to the tenant's crops, which had been caused by the landlord's selling, felling and removing timber

[22] Part of the opinion is omitted.

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without applying for leave to enter. The jury assessed the damages at £300., and the court refused to interfere, although the new value of the entire crops did not exceed £200. Nor do we think there is anything in Chase v. N. Y. Central R. R. Co., 24 Barb. (N. Y.) 275, Easterbrook v. Erie Railway Co., 51 Barb. (N. Y.) 94, and Francis v. Schoellkopf, 53 N. Y. 152, in conflict with this rule. Those were actions for injuries to real estate caused by the wrongful acts of the defendants. The plaintiffs were permitted to recover compensation for the injury; and in the latter case, which was for a nuisance, the court decided that the proper measure of damages was the difference in the rental value free from the effects of the nuisance and subject to it. * * *[23]

II. PERSONALTY.

(A) Conversion and Injury.

REID v. FAIRBANKS.

(Court of Common Pleas, 1853. 13 C. B. 692.)

Russell, at Pictou, in Nova Scotia, built a ship for plaintiff and executed a bill of sale for her to him when the vessel was part done. He subsequently altered the registry of the vessel and sold her, still unfinished, to defendant, who took possession and finished the vessel and sent her on a voyage to Liverpool with cargo. The defendant's act was held to be a conversion.

Sir Fitzroy Kelly, for the plaintiffs.[24] * * * With respect to the damages—the plaintiffs claim to be entitled to the full value of the ship; and, further, they claim to be entitled to the full amount of freight earned on the voyage from Nova Scotia to Liverpool. [JERVIS, C. J.—Can you recover the value of the freight in this action?] It is laid as special damage. [MAULE, J.—The damages in trover, are, the value of the thing converted. The fact of the defendants' having used it profitably after the conversion, gives the plaintiff, I apprehend, no title to the profits.] If the defendants had not been guilty of the conversion, the plaintiffs would have made profit by the use of the ship; therefore, the proper measure of damages, is, besides the value of the ship at the time of the conversion, the freight she would, but for the defendants' wrongful act, have earned for the plaintiffs. [JERVIS, C. J., referred to Mercer v. Jones, 3 Campb. 477, where Lord Ellenborough ruled, that, in trover for a bill of exchange, the damages

[23] See, also, O. & G. S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185 (1889); Georgia R. R. & B. Co. v. Berry, 78 Ga. 744, 4 S. E. 10 (1887).

[24] Part of the arguments of counsel are omitted as here indicated, and the statement of facts is rewritten.

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were to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion; and to Davis v. Oswell, 7 C. & P. (32 E. C. L. R.) 804, where, in trover for a horse, with an averment of special damage, that the plaintiff was put to expense in hiring other horses, Parke, B., intimated an opinion that the plaintiff was entitled to recover the value of the horse at the time of the conversion, and the expense he had been put to for hire of other horses, deducting from that amount the sum he would have paid for the keep of his own horse during the time. MAULE, J.—What the plaintiffs claim here, is, something beyond that.] This is an action on the case for a wrong done. On what principle can the court hold that all the damages sustained by the plaintiffs are not recoverable? The plaintiffs have lost the use of their ship on the voyage home. [MAULE, J.—Suppose the action had been brought immediately upon the conversion of the ship, the damages, you must concede, would merely have been the value of the ship at that time. Can you contend that the damages increase after the accrual of the cause of action?] There can be no valid reason why they should not: the whole cause of action is not the conversion; but the conversion plus the special damage. [JERVIS, C. J.—If the conversion had taken place at Liverpool, the point would have been presented more favourably for the plaintiffs. The demand and refusal, however, are only evidence of a conversion; and here there was proof of an actual conversion by the alteration of the registry at Nova Scotia. MAULE, J.—The value of the ship is £3000., because she is capable of earning money by carrying goods or freight. When you pay a man for his ship, you pay him for what it can or may or shall do to produce profit.] * * * The amount of damages depends upon the state of the ship at the time of conversion. The plaintiffs are not bound to adopt the earliest conversion. The defendants were guilty of a conversion when they took the vessel and put the stores on board. If the defendants laid out money upon the plaintiffs' ship, they did so of their own wrong. [JERVIS, C. J.—In Martin v. Porter, 5 M. & W. 351, where the defendant, in working his coal mine, broke through the barrier, and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for the purpose of sale—it was held, in trespass for such working, that the proper estimate of damages, was, the value of the coal when gotten, without deducting the expense of getting it: and Lord Abinger said: "If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How, then, can he claim to deduct it? He cannot set up his own wrong."] That is a distinct authority. So, in Greening v. Wilkinson, 1 C. & P. 625, it was held, that, in trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion: and Abbott, C. J., said: "The plaintiff might have had a good opportunity of selling the goods, if they had not been detained." [MAULE, J.—

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That is hardly consistent with the modern doctrine.] If a man takes my ship in an unfinished state, and, without my knowledge, lays out money upon her, may I not demand my ship with all its improvements? [CRESSWELL, J.—"Without your knowledge!" Here, the money was not expended upon the ship until after the plaintiffs had notice that the defendants asserted a claim to her. This appears from the defendants' letter to the plaintiffs of the 1st of June, 1849.] It is immaterial whether the money is expended by the wrongdoer with or without the knowledge of the true owner of the property. [MAULE, J.—It may be that the wrongdoer, who acquires no property in the thing he converts, acquires no lien for what he expends upon it; and the owner may bring detinue or trover. But it does not follow, that, if the owner brings trover, he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is, the amount of the pecuniary loss the plaintiffs have sustained by the conversion of their ship. JERVIS, C. J.—That, is what she was really worth when the defendants converted her: the plaintiffs have lost the value of the vessel before the defendants began to lay out money upon her.] It would be competent to a jury to give the value at the one time or the other. [MAULE, J.—It never could have been intended here that Mr. Richards should have power to exercise that sort of discretion which Lord Tenterden, in Greening v. Wilkinson, speaks of being exercised by the jury.] There is no warrant for saying that the plaintiffs' right is limited to the value of the ship only after deducting what the defendants have wrongfully laid out in completing her. [JERVIS, C. J.—In strictness that may be so: but no jury would give such damages: they would always give what they conceived the plaintiff justly entitled to.] But for the defendants' wrongful act, Russell would have completed the vessel, and the plaintiffs would have earned freight.

JERVIS, C. J.[25] We all think that the proper principle on which to estimate the damages in this case, will be, the value of the ship, and all her stores, etc., on the 29th of March, 1849, the time when Russell ceased to work upon her on the plaintiffs' account, and when the defendants took possession of her; and that, as a mode of ascertaining such value, the arbitrator should consider what would have been the value of the ship at Pictou, if she had been completed by Russell according to his contract with the plaintiffs, and deduct therefrom the money that would necessarily have been laid out by Russell after the 29th of March, 1849, in order to complete her according to the contract. * * *[26]

[25] Only part of the opinion of Jervis, C. J., is here given; the opinions of other judges being omitted.

[26] And see Chinery v. Viall, ante, p. 325.

See Archer v. Williams, 2 Car. & K. 26 (1846). Where goods are surrendered by a bailee to a third party under the owner's orders, but earlier than as directed, this is a conversion, but only nominal damages are recoverable. Hiort v. L. & N. W. Ry. Co., L. R. 4 Exch. Div. 188 (1879).

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HURD v. HUBBELL.

(Supreme Court of Errors of Connecticut, 1857. 26 Conn. 389.)

Trover. Upon the trial the plaintiff claimed to have proved that the property had been left by him in the hands of one Hector, upon an agreement that it should become the property of Hector upon the payment by him of a certain note, and not before; that Hector afterwards, before payment of the note, and while the property belonged to the plaintiff, transferred it to the defendant, who converted it to his own use; and that the defendant took the property with knowledge of the plaintiff's rights, and for the purpose of enabling Hector to defraud the plaintiff. Thereupon, in accordance with the request of the plaintiff, the court instructed the jury that if they should find for the plaintiff, and should find the facts in relation to the manner and purpose of the taking of the property by the defendant to be as claimed by the plaintiff, and should find that the plaintiff, by the willful misconduct of the defendant, had been compelled to incur the trouble and expense of this litigation, they might on that account give such further damages, in addition to the value of the property and interest, as they might deem reasonable. The jury returned a verdict for the plaintiff, for a sum exceeding the value of the property and interest; and thereupon the defendant moved for a new trial for error in the charge of the court.

ELLSWORTH, J.[27] The question presented in this case is, what is the true rule of damages in the action of trover. We have so recently presented our views on this subject, and on the subject of damages in all actions of tort, in the case of St. Peter's Church of Milford v. Beach, 26 Conn. 355, that we need not dwell on the topic farther. We there held, that in such an action as this, the value of the property and interest is the rule of damages, and that the expenses of litigation, not being the natural and proximate consequences of the conversion, are not to be recovered.

Besides, we have always understood that the rule of damages in this kind of action, is the value of the property at the time of conversion, and interest. It has been so from the first, in our courts, and in the English courts with a slight qualification in the case of sales of chattels where the price is paid in advance, and in that of contracts for the delivery of stock. The rule is the same throughout this country. * * * As the court laid down a different rule on the trial of this case before the jury, we advise a new trial.

[27] Part of the opinion is omitted.

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WEHLE v. HAVILAND et al.

(Court of Appeals of New York, 1877. 69 N. Y. 448.)

This was an action of trespass for entering upon plaintiff's premises and unlawfully taking and carrying away her stock of goods. The goods were taken under and by virtue of several attachments in favor of defendants and others, which attachments were thereafter set aside and vacated as irregularly issued.

ALLEN, J.[28] * * * The learned judge, supposing that he was following the Commission of Appeals in Wehle v. Butler, not then reported, but since reported in 61 N. Y. 245, instructed the jury that the plaintiff was entitled to recover the retail value of the goods taken, and again that the only question for them was what was the fair retail value of the goods, and the interest on that amount from the time of the seizure. The court withdrew from the consideration of the jury the question of malice, and the claim of the plaintiff to recover exemplary damages, or damages in excess of the value of the goods and interest thereon. The most that was decided by the Commission of Appeals in Wehle v. Butler, and that does not seem from the reported opinion to have been considered by that learned court, was that in actions of trespass de bonis asportatis, or trover, evidence of the retail value of the goods might be given as one of the elements for determining their true or market value at the time and place of the asportation or conversion. Whether that was the true measure of damages was not before the court, or considered by them. This is apparent by the report of the same case in 35 N. Y. Super. Ct. 1. The Superior Court of New York City declined to consider the question, because not presented by any ruling or decision of the trial court or any distinct exception. There is no controversy as to the measure of damages in actions of this character. It is the actual value of the property at the time of the taking with interest thereon from the time. Stevens v. Low, 2 Hill, 132; Kennedy v. Strong, 14 Johns. 128.

In some cases where the value of the property is fluctuating the value may be fixed at the time the owner is deprived of his property, or within such reasonable time thereafter as he might have replaced it. Romaine v. Van Allen, 26 N. Y. 309. There are cases in which the highest price up to the time of the trial, has been allowed. But these are exceptional cases and do not apply when the value of the property is not subject to fluctuations and the value at the time of the tortious taking and interest will indemnify the owner. The plaintiff was entitled to recover so much as would repair the injury sustained by the wrong doing of the defendants, and that was the money value of the goods at the time and interest thereon. The money value is the price at which they could be replaced for money in the market, and hence the inquiry is as to the market value of the goods when they have a market

[28] Part of the opinion is omitted.

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value. Dana v. Fiedler, 12 N. Y. 41, 62 Am. Dec. 130. The sum at which the plaintiff could have replaced the goods in market would have indemnified her for the loss sustained, and the interest upon that sum would have given her the legal profit to which she was entitled, the fixed legal rate of interest taking the place of the uncertain and indefinite profits which the plaintiffs might have made either from the possession of the goods or their equivalent in money.

It is well settled that in actions for the conversion of goods, or for the nondelivery of goods or chattels upon contract, unearned and speculative profits will not be included as a part of the damages to be recovered. Blanchard v. Ely, 21 Wend. 342, 34 Am. Dec. 250; Boyd v. Brown, 17 Pick. (Mass.) 453; Smith v. Condry, 1 How. 28, 11 L. Ed. 35; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718.

The retail value or the price at which goods are sold at retail includes the expected and contingent profits, the earning of which involves labor, loss of time and expenses, supposes no damages to or depreciation in the value of the goods, and is dependent upon the contingency of finding purchasers for cash, and not upon credit, within a reasonable time, the sale of the entire stock without the loss by unsalable remnants, and the closing out of a stock of goods as none ever was, or ever will be closed out, by sales at retail at full prices.

By the allowance of these unearned and uncertain profits and also the allowance of interest from the time of the conversion the plaintiff recovers the profits which she had hoped to make in the future, and interest upon the profits, as well as upon her investment. The plaintiff was entitled to compensation and that consisted of the market value of the goods, their cost, or what they would have cost in the market and interest thereon and nothing more. The retail profit was not included in the compensation to which she was entitled. * * *

LAZARUS v. ELY.

(Supreme Court of Errors of Connecticut, 1878. 45 Conn. 504.)

See ante, p. 399, for a report of the case.

GLASPY v. CABOT.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 435.)

See ante, p. 342, for a report of the case.[29]

[29] See, also, Ingram v. Rankin, ante, p. 372; Beede v. Lamfrey, ante, p. 378; Griggs v. Day, ante, p. 352, note; Bateman v. Ryder, ante, p. 348; Scott v. Rogers, ante, p. 360; Baker v. Drake, ante, p. 361; Wright v. Bank of the Metropolis, ante, p. 364; Dimock v. United States Bank, ante, p. 368; Eaton v. Langley, ante, p. 381; White v. Yawkey, ante, p. 387; Gaskins v. Davis, ante, p. 389; Bolles Woodenware Co. v. United States, ante, p. 392; Carpenter v. American Building & Loan Association, ante, p. 399, note; Perrott v. Shearer, ante, p. 403.

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GILLETT v. WESTERN R. CORPORATION.

(Supreme Judicial Court of Massachusetts, 1864. 8 Allen, 560.)

Action of tort for the injury of plaintiff's horses, occasioned by the negligence of the defendant. Upon the question of damages, the judge instructed the jury that the plaintiffs were entitled to recover the diminution of the market value of the horses, occasioned by the injury, and, in addition, such sums of money as the plaintiffs had paid out in reasonable attempts to cure them, with a reasonable compensation for their own services in attempting to cure them, and a reasonable sum as compensation for the loss of the use of their horses while under such treatment.[30]

BIGELOW, C. J.[31] * * * It does not appear that the rule of damages was incorrectly laid down at the trial. As we understand the instructions, the jury were told that the plaintiffs were entitled to recover a sum equal to the diminution of the market value of the horses, caused by the injuries; to be ascertained, not by their condition immediately after the occurrence of the accident, but by that in which they were shown to be at or about the time of the trial, and after they had been partially restored to health and soundness by restorative means which the plaintiffs had reasonably used in the relief and cure of the injuries which they had received. Thus construed, the instructions were clearly right. The plaintiffs were entitled to recover their reasonable expenses incurred in curing the horses, because thereby they had diminished the extent of the injuries, and the amount of damages which the defendants would otherwise have been liable to pay. * * *

(B) Detention.

ALLEN v. FOX.

(Court of Appeals of New York, 1873. 51 N. Y. 562, 10 Am. Rep. 641.)

This action was brought to recover the possession of a horse. The horse had been taken in the action, and delivered to the plaintiff and retained by him to the time of the trial. There was conflicting evidence as to the title of the horse, but the jury found the title to be in the defendant, and assessed its value at $175, and damages for its detention by the plaintiff at seventy-five dollars. The defendant, for the purpose of proving his damages for the detention, gave evidence of the value of the use of the horse. The plaintiff objected to this evidence, claiming that the value of the use was not the proper measure or rule of damage.[32]

[30] This statement is abridged from that of the official report.

[31] Part of the opinion is omitted.

[32] This statement is abridged from that of the official report.

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EARL, C.[33] * * * In actions of trover, in cases where there has been no increase in the value of the property converted intermediate the conversion and the time of the trial, the measure of damages is the value at the time of the conversion, and interest thereon to the time of the trial, and it would have to be a very special case that would authorize greater damages. The claim here, is that the same rule applies in an action of replevin, and I shall endeavor to show that it does not apply in all cases, and that this case is one of a class to which it cannot be applied.

The very nature of the two kinds of action shows that the same rule of damages should not be inflexibly applied in each.

In the action of trover, the plaintiff does not seek to recover his property, but its value as a substitute for the property. He abandons the property to the defendant, preferring to pursue him for its value. He makes a kind of forced sale of it, without any expectation or intention of retaking it. Hence, in such cases, he can be expected at once to go into the market and supply himself with the same property at its market value if he desires it. But in the action of replevin, the plaintiff seeks to recover the property, and is in all stages of the case to final judgment in pursuit of that, and not its value. And during the whole time the defendant may have the possession and the use (if it can be used) of his property. At the termination of the suit it is not optional with him to take the property or its value. If the defendant has the property, and will permit him to take it, he is obliged to take it. Code, § 277; Dwight v. Enos, 9 N. Y. 470; Fitzhugh v. Wiman, Id. 599. Hence the plaintiff cannot always be expected or required, in such cases, to go into the market and supply himself with the same kind of property at its market value. Suppose the controversy be about a canal boat or a carriage, or an expensive machine. If the plaintiff should go into market and buy another, at the end of the litigation, in case of success, he would have on hand duplicates of the article, and would thus be subjected to further loss and inconvenience. These observations are made simply to show that there is nothing in the nature of the two actions requiring the application of the same rule of damages.

In the action of replevin, under the Code, the jury are required to assess the value of the property, and damages for its detention. The value here intended is the value at the time of the trial. In case the prevailing party can obtain a delivery of the property, he must take it as it then is; if he cannot obtain such delivery, then the value is intended as a substitute and precise equivalent of the property. The damages for detention are the same, whether the party recover the property or its value. Now, suppose, the property has been badly depreciated, intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it if he can obtain it, and he is

[33] Part of the opinion is omitted.

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indemnified for the depreciation by the damages assessed to him. But he recovers the same damages if he cannot obtain the property and is obliged to take its value, and then if the value has been assessed as it existed at the time of the taking, before the depreciation, it is clear that he gets more than an indemnity. Hence there is no way of administering this law, except by holding that the value required to be assessed by the jury means the value at the time of the trial. Young v. Willet, 8 Bosw. 486; Brewster v. Silliman, 38 N. Y. 423, 429.

With this rule in view, what should be the measure of damages for the detention? In many cases interest on the value from the time of the wrongful taking would be a proper measure. It would be generally in all cases where the property detained was merchandise kept for sale, grain and all other articles of property useful only for sale or consumption. In such cases, if the owner recover the interest on the value of his property from the time he was deprived of it, he will generally have a complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value, taken as it was before the depreciation, and the two items will furnish the amount of the damage. This damage, together with the property or its value at the time of the trial, will give the owner as complete indemnity as the law is generally able to give any person seeking redress for a wrong. But the same measure of damages would not generally furnish the owner an indemnity in case the property claimed had a value for use, or, in other words, a usable value, such as horses, cows, carriages and boats. In such case the direct damage which the owner suffers is the loss of the use, and the value of the use should be the measure of damage.

This case illustrates the injustice of the rule contended for by the plaintiff as well as any. The jury found the value of the horse to be $175 and the value of the use to be $75 for one year and three months. For the same period the interest would have been $15.31, and if that had been taken as the measure of damages, the owner would have lost about $60 and the wrongdoer would have made that much profit out of his wrong. A rule of damage which works out such a result cannot have a basis of principle or justice to stand upon. * * *

REDMOND v. AMERICAN MFG. CO.

(Court of Appeals of New York, 1890. 121 N. Y. 415, 24 N. E. 924.)

The defendant company agreed to operate fourteen patented machines of plaintiff, who was an inventor, for a certain period of time, and at the expiration thereof either to purchase them at an agreed price or to return them to plaintiff. The machines were an untried device to fasten rivets in the joints of umbrella ribs. This action was brought to recover the machines, or their value, with damages for their detention.

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O'BRIEN, J.[34] * * * It is urged upon this appeal, on the authority of Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641, that he was entitled to recover as damages for the unlawful detention of the property such sum as he could prove to be the value of the use of the property during the period that it was wrongfully detained. That was an action to recover the possession of a horse; and what is there called the "usable value of the horse" was held to be a proper measure of damages for its detention. The learned judge who gave the opinion in the case admits that the interest on the value of the property at the time of the trial is generally the proper measure of damages for its wrongful detention, when it consists of merchandise kept for sale, and all other articles of property valuable only for sale or consumption. In actions to recover the possession of specific personal property many cases, no doubt, may and do arise where the interest would not furnish to the owner of the property a just or sufficient indemnity for his loss; but such cases are special and exceptional, and it is scarcely possible to group them under any general rule or principle. There is a manifest difference between the case of the wrongful detention of a horse or other property which is in constant and daily use, and the usable value of which is well known and readily ascertained, and property of the character of that which was the subject of controversy in this case. Here the property was manufactured and delivered to the defendant for the purpose of sale, like any other article of merchandise. It is not claimed, and it is not at all likely, that the plaintiff could have put the machines to any other use while the defendant detained them after the demand. When machinery in operation is taken from the owner of a factory, who requires it for immediate, constant, and daily use, and detained by the wrong-doer, such an act would probably inflict upon the owner damages which could not be compensated by the interest on its value for the period of the wrongful detention. But when, as in this case, the maker of a patented machine or article, desiring to introduce it into general use, delivers it with a view to a sale, and afterwards becomes entitled to have the same returned to him by reason of the failure of the party to whom it is delivered on trial to accept it, or comply with the terms and conditions upon which it was delivered, the interest on its price or value from the time of the wrongful detention to the trial furnishes a just indemnity for the wrong, and the proper rule of damages, in such cases. * * *

MITCHELL v. BURCH.

(Supreme Court of Indiana, 1871. 36 Ind. 529.)

See ante, p. 425, for a report of the case.[35]

[34] Part of the opinion is omitted, and the statement of facts is rewritten.

[35] See, also, Clement v. Duffy, ante, p. 374, note; Griffin v. Colver, ante, p. 245; Hadley v. Baxendale, ante, p. 189; Chappell v. Ellis, ante, p. 473.

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SECTION 3.—FRAUD AND DECEIT.

BRIGGS v. BRUSHABER.

(Supreme Court of Michigan, 1880. 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187.)

COOLEY, J.[86] Plaintiff sued defendant for fraud in inducing her, by false representations, to make a loan to one Ferchon, secured by a mortgage on land which was worth much less than the sum loaned upon it. The case was tried by jury, and special findings are returned. The sum loaned was $450, and for this a mortgage for $500 was taken. The mortgagor was irresponsible. The jury found that the fraud was made out by the evidence, and that plaintiff was entitled to recover. The mortgage, however, had never been foreclosed, and was still in the hands of the plaintiff as an existing security. Under these circumstances, although the jury found the value of the mortgaged premises to be only $250, the court was of opinion that the plaintiff could recover nominal damages only. The view of the judge seemed to be that no actual damages were sustained by the plaintiff, or would be until an attempt to enforce the mortgage had been made, and in whole or in part had proved unsuccessful. * * *

In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was a marketable commodity, and she lost by the fraud itself the difference between the market value of that which she received and that which she was to have under the arrangement. It is true this could not be definitely fixed by the evidence; witnesses might disagree respecting it; the market value of lands might rise afterwards to an extent that would make the mortgage available to its full amount; but there is nothing unusual in contingencies of this sort being involved in litigation, and casting uncertainty upon any attempt to do justice.

Had the plaintiff been defrauded in the purchase of a horse, similar questions might arise; the plaintiff might gain or might lose by the evidence convincing the jury that the horse was worth less or more than the real market value, and an unexpected rise in horses might save him from any loss at all. But controversies of the sort can only be determined in one way: the jury must judge of the extent of the damage by such evidence of value as the parties may be able to produce, and to postpone a remedy until the time shall arrive when all possibility of error or mistake is precluded, would be grossly unjust, and, in many

[86] Part of the opinion is omitted.

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cases, equivalent to a denial of remedy. The latter might be the case here if the mortgage had been on long time. We think the court erred in limiting the recovery to nominal damages. The plaintiff was entitled to recover the difference between the $450 loaned by her, and the value of the securities which she received therefor, and to interest upon this sum from the time the loan was made. * * *

STILES v. WHITE et al.

(Supreme Judicial Court of Massachusetts, 1846. 11 Metc. 356, 45 Am. Dec. 214.)

Trespass upon the case for deceit in the sale of a horse. The defendants further contended, that if the horse, at the time of the sale, was fairly worth all the plaintiff paid for him, then there was no damage, and the action would not lie.[37]

WILDE, J.[38] * * * The court ruled that the measure of damages was the difference between the actual value of the horse sold, and the value of such a horse as that was represented to be by the defendants. This rule of damages we think perfectly correct. It was so laid down by Buller, J., in Towers v. Barrett, 1 T. R. 136; by Lord Denman, in Clare v. Maynard, 7 Car. & P. 743; and so it was decided in Cary v. Gruman, 4 Hill (N. Y.) 625, 40 Am. Dec. 299, and in other cases cited for the plaintiff. The defendants' counsel admitted that this was the well established rule in actions on the contract of warranty; and surely the defendants cannot claim a more favorable rule of damages, on the ground of their own fraud. The plaintiff was clearly entitled to such a horse, or the value of such a horse, as that sold to him by the defendants was by them represented to be. * * *

PEEK v. DERRY.

(Supreme Court of Judicature, 1887. L. R. 37 Ch. Div. 541.)

Plaintiff purchased 400 shares of stock in the Plymouth, Devenport & District Tramways Company for which he paid £4000. The action is brought for damages sustained by reason of reliance on untrue statements in the prospectus of the company made by the defendant, which had induced the plaintiff to make the purchase.

COTTON, L. J.[39] * * * The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was

[37] This statement is abridged from that of the official report.

[38] Part of the opinion is omitted.

[39] Parts of the opinions in this case are omitted, and the statement of facts is rewritten.

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induced to buy the shares, he had the £4000. in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4000., and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares, instead of having in his pocket the £4000. The loss, therefore, must be the difference between his £4000. and the then value of the shares. * * *

Sir JAMES HANNEN. * * * The question is, how much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4000. in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got. That must be ascertained by the light of the events which have happened down to the time of the inquiry—not what the shares might have been sold for, because he was not bound to sell them, and subsequent events may shew that what the shares might have been sold for was not their true value, but a mistaken estimate of their value.

LOPES, L. J. The question in this case is what is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true measure of his damage? In my opinion, it is the difference between the £4000. he paid and the real value of the shares after they were allotted. Any damage occurring after the discovery of the fraud, when the plaintiff might have rescinded the contract, and which would not be attributable to his acting on the misrepresentation, but to other causes, in my opinion would not be recoverable.[40]

SECTION 4.—MISUSE OF LEGAL MACHINERY.

LYTTON v. BAIRD.

(Supreme Court of Indiana, 1883. 95 Ind. 349.)

COLERICK, C.[41] This was an action for malicious prosecution brought by the appellee against the appellant. The complaint, in substance, averred that, on the 1st day of February, 1881, the appellant maliciously, and without probable cause, procured the grand jury of Monroe county to indict the appellee upon a charge of perjury; that he was arrested and imprisoned, and afterward gave bond for his appearance in the Monroe circuit court to answer said charge; that

[40] See, also, Potter v. Mellen, ante, p. 16, note, and cases under heading "Breaches of Warranty Respecting Personalty." Further, see Morse v. Hutchins, 102 Mass. 439 (1869), Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279 (1889), and the article in 14 Harv. Law Rev. 454.

[41] Part of the opinion is omitted.

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subsequently such proceedings were had in said cause that he was fully and finally discharged from said prosecution; that said charge was wholly false; that he was compelled to expend and become liable for a large amount, to wit, $1,000, in employing counsel and preparing for the defence of the case, and that he was damaged in the sum of $5,000, for which he demanded judgment. * * *

The appellant complains of the eleventh instruction, and contends that it is erroneous: (1) Because it informed the jury that if they found for the appellee, in assessing his damages they should give "such damages as will compensate him for any actual expense and loss he has sustained by reason of the prosecution." (2) Because the jury were told that they had the right to add such other damages as they thought, under the circumstances, would be proper as punitive damages.

The averment in the complaint relative to expenses actually incurred by the appellee by reason of the prosecution, was, "That he was compelled to expend and become liable for a large amount, to wit, $1,000, in employing counsel and preparing for the defence of the case." There was no averment that he had incurred any other expenses, or had sustained any losses, by reason of the prosecution. The only damages for expenses that he could have recovered, under this averment, were those therein mentioned; he was not entitled to recover damages for losses sustained by him, as none were averred. The instruction, in this respect, was erroneous, but it was a harmless error, as no evidence was introduced on the trial to prove that any such losses had been sustained by the appellee, or that any expenses had been incurred by him other than those caused by the employment of counsel to defend him on the criminal charge. These he was entitled to recover, although they were then unpaid. Ziegler v. Powell, 54 Ind. 173. But the appellant has no cause to complain of that part of the instruction relating to compensatory damages, as the rule fixed by the court for their measurement, except in the respect to which we have referred, was restricted to narrower limits than the law justified. If, as in this case, the malicious prosecution complained of is founded upon a criminal charge, on which the defendant therein was arrested, he has a right to indemnity for all the injury to reputation, feelings, health, mind and person caused by the arrest, including the expenses of his defence. Sheldon v. Carpenter, 4 N. Y. 579, 55 Am. Dec. 301; 2 Greenl. Ev. § 456; 3 Phillips, Ev. p. 573. The allegations of the complaint were sufficiently broad to authorize such damages, as they recited the arrest and imprisonment of the appellee.

The right in such actions to recover punitive damages is well settled by the authorities. The jury, in estimating damages, are not confined to the actual damages proved, but they may, in the exercise of a sound discretion, give exemplary or punitive damages. Ziegler v. Powell, supra; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674. The jury may take into consideration all the circumstances of the case,

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and award such damages as will not only be a compensation for the wrong and indignity sustained in consequence of the wrongful act, but may also award exemplary or punitive damages as a punishment for such act. * * *[42]

LAWRENCE v. HAGERMAN.

(Supreme Court of Illinois, 1870. 56 Ill. 68, 8 Am. Rep. 674.)

This was an action on the case, brought by Hagerman against Lawrence and others, to recover damages for the wrongful and malicious suing out by the defendants of a writ of attachment, without probable cause, and causing the same to be levied upon the goods and chattels of the plaintiff.

SCOTT, J.[43] * * * The main objection taken is to the evidence offered to establish the measure of damages. It seems to us that the averments in the declaration are broad and comprehensive enough to admit of evidence of all the injuries sustained in consequence of the wrongful act alleged. For the purpose of estimating the extent and magnitude of the injury, the court permitted the appellee to introduce evidence of the nature, character, and amount of business transacted at and before the date of the wrongful levy, and also evidence of the complete destruction of that business, and of the extent to which the credit and financial reputation of the appellee were impaired, and also evidence of the actual loss of the stock levied on, and of the expenses incurred in and about the defense of the suit. No reason is perceived why these facts do not constitute proper elements for the consideration of a jury in estimating the damages occasioned by the tortious act of the appellant. The evidence was pertinent to the issue made by the pleadings and the issue stated was broad enough to admit the proof.

In actions on the case the party injured may recover from the guilty party for all the direct and actual damages of the wrongful act and the consequential damages flowing therefrom. The injured party is entitled to recover the actual damages and such as are the direct and natural consequence of the tortious act.

In this instance the amount of money actually paid out in and about the defense of the suit, and the depreciation of the value of the stock on which the wrongful levy is alleged to have been made, are not the only damages sustained, if the appellant wrongfully, unjustly and maliciously and without probable cause sued out the writ of attachment and caused the same to be levied in the manner charged. The business of the appellee had hitherto been prosperous, his credit and financial reputation good, and all were destroyed by the malicious

[42] See, also, Spear v. Hiles, 67 Wis. 350, 30 N. W. 506 (1886).

[43] Part of the opinion is omitted.

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acts of the appellant, if it be conceded that he was guilty as alleged. It cannot be said that the law will afford no redress for the destruction of financial credit and reputation, or mete out no measure of punishment to the guilty party who wantonly and maliciously destroys them. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business, credit and reputation of the appellee, the law will require him to make good the loss sustained. Chapman v. Kirby, 49 Ill. 211.

The instructions given for the appellee announce these principles with sufficient accuracy. The jury were correctly told that in estimating the damages they might take into consideration any injury shown by the evidence that the appellee sustained in his business and reputation, together with the losses actually sustained by the wrongful suing out of the writ of attachment. The jury were also instructed that they were not confined to the actual damages, if the wrongful acts were wantonly and maliciously committed, but they might give exemplary damages. Such is the well established rule of the law. * * *[44]

[44] See, also, Ross v. Leggett, ante, p. 486, and cases under heading "Court Expenses."

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CHAPTER II.

IN CERTAIN SPECIFIC CONTRACT ACTIONS.

SECTION 1.—IN THOSE RESPECTING SERVICES.

STARK v. PARKER.

(Supreme Judicial Court of Massachusetts, 1824. 2 Pick. 267, 3 Am. Dec. 425.)

LINCOLN, J.[1] * * * The exceptions present a precise abstract question of law for consideration, namely, whether upon an entire contract for a term of service for a stipulated sum, and a part performance, without any excuse for neglect of its completion, the party guilty of the neglect can maintain an action against the party contracted with, for an apportionment of the price, or a quantum meruit, for the services actually performed. * * *

It is no less repugnant to the well-established rules of civil jurisprudence, than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it. * * * A distinction has been uniformly recognized in the construction of contracts, between those in which the obligation of the parties is reciprocal and independent, and those where the duty of the one may be considered as a condition precedent to that of the other. In the latter cases, it is held, that the performance of the precedent obligation can alone entitle the party bound to it, in his action. Indeed the argument of the counsel in the present case has proceeded entirely upon this distinction, and upon the petitio principii in its application. It is assumed by him, that the service of the plaintiff for a year was not a condition precedent to his right to a proportion of the stipulated compensation for that entire term of service, but that upon a just interpretation of the contract, it is so far divisible, as that consistently with the terms of it, the plaintiff having laboured for any portion of the time, may receive compensation pro tanto. * * *

A proposition apparently more objectionable in terms can hardly be stated, and if supported at all it must rest upon the most explicit authority. The plaintiff sues in indebitatus assumpsit as though there was no special contract, and yet admits the existence of the contract to affect the amount he shall recover. The defendant objects to the re-

[1] Part of the opinion is omitted.

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covery of the plaintiff on the express contract which has been broken, and is himself charged with damages for the breach of an implied one which he never entered into. The rule that expressum facit cessare tacitum is as applicable to this, as to every other case. If the contract is entire and executory, it is to be declared upon. Where it is executed and a mere duty to pay the stipulated compensation remains, a general count for the money is sufficient.

Numerous instances are indeed to be found in the books of actions being maintained where the specific contract has not been executed by the party suing for compensation, but in every case it will be seen that the precise terms of the contract have been first held, either to have been expressly or impliedly waived, or the nonexecution excused upon some known and settled principle of law. * * * Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it.

That such a contract as is supposed in the exceptions before us expresses a condition to be performed by the plaintiff precedent to his right of action against the defendant, we cannot doubt. The plaintiff was to labour one year for an agreed price. The money was to be paid in compensation for the service, and not as a consideration for an engagement to serve. * * * The agreement of the defendant was as entire on his part to pay, as that of the plaintiff to serve. The latter was to serve one year, the former to pay one hundred and twenty dollars. * * *

The performance of a year's service was in this case a condition precedent to the obligation of payment. The plaintiff must perform the condition, before he is entitled to recover anything under the contract, and he has no right to renounce his agreement and recover upon a quantum meruit * * *[2]

[2] In Cutter v. Powell, 6 Term R. 320 (1795), it was held that there was no recovery on the contract or on a quantum meruit if the plaintiff were in default. Important later cases were Hulle v. Heightman, 2 East, 145 (1802); Ellis v. Hamlen, 3 Taunt. 52 (1810); Spain v. Arnott, 2 Starkie, 256 (1817); Turner v. Robinson, 6 Car. & P. 15 (1834); Ridgway v. H. M. Co., 3 Adol. & E. 171 (1835); Sinclair v. Bowles, 9 Barn. & C. 92 (1829); Roberts v. Havelock, 3 Barn. & Adol. 404 (1832). A number of exceptions were ingrafted on the rule. Read v. Rann, 10 Barn. & C. 438 (1830); Farnsworth v. Garrard, 1 Camp. 38 (1807); Denew v. Daverell, 3 Camp. 451 (1813); Dakin v. Oxley, 15 C. B. (N. S.) 646 (1864); Chapel v. Hickes, 2 Cromp. M. & R. 214 (1833); Goodman v. Pocock, 15 Q. B. 576 (1850); Buxton v. Cornish, 12 Mees. & W. 426 (1844). If the other party be in default, a recovery on a quantum meruit is allowed by the English cases. Withers v. Reynolds, 2 Barn. & Adol. 882 (1831); Franklin v. Miller, 4 Adol. & E. 599 (1836); Planche v. Colburn, 8 Bing. 14 (1831); Prickett v. Badger, 1 C. B. (N. S.) 296 (1856); Ehrensperger v. Anderson, 3 Exch. 148 (1848); Hochster v. De la Tour, 2 El. & Bl. 678 (1853). See, also, Thurston's Cases on Quasi Contracts.

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BRITTON v. TURNER.

(Supreme Court of New Hampshire, 1834. 6 N. H. 481, 26 Am. Dec. 713.)

PARKER, J.[3] It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of $120, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in quantum meruit? Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract by performing the whole labor contracted for, is not entitled to recover any thing for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. Stark v. Parker, 2 Pick. 267, 13 Am. Dec. 425. * * * That such a rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non performance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non fulfillment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage

[3] Part of the opinion is omitted.

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could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is $95, if the defendant can succeed in this defence, he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfillment of his contract. * * *

There are other cases, however, in which principles have been adopted leading to a different result. It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. * * *

Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value, whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation, that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. * * *

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It is said, that in those cases where the plaintiff has been permitted to recover there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance.

If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished.

We have no hesitation in holding that the same rule should be applied to both classes of cases, especially, as the operation of the rule will be to make the party who has failed to fulfill his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. Pordage v. Cole, 1 Saund. 320c; 2 Starkie, Ev. 643.

It is as "hard upon the plaintiff to preclude him from recovering at all, because he has failed as to part of his entire undertaking," where his contract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labor actually performed.

We hold then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it. Taft v. Inhabitants of Montague, 14 Mass. 282, 7 Am. Dec. 215; 2 Starkie, Ev. 644.

But if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and ad-

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vantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane, Abr. 224.

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. Farnsworth v. Garrard, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent.

In fact, we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that, the contract being entire, there can be no apportionment; and that, there being an express contract, no other can be implied, even upon the subsequent performance of service—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. * * *

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth or the amount of advantage he receives upon the whole transaction (Wadleigh v. Sutton, 6 N. H. 15, 23 Am. Dec. 704); and, in estimating the value of the labor, the contract price for the service cannot be exceeded (Hayden v. Inhabitants of Madison, 7 Greenl. [Me.] 78;

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Dubois v. Canal Co., 4 Wend. [N. Y.] 285; Koon v. Greenman, 7 Wend. [N. Y.] 121).

If a person makes a contract fairly he is entitled to have it fully performed; and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non performance.

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defence he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non fulfillment of the contract.

If in such case it be found that the damages are equal to or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. * * *

ROGERS v. PARHAM.

(Supreme Court of Georgia, 1850. 8 Ga. 190.)

WARNER, J.[4] * * * It appears that the plaintiff and defendant entered into a written, special contract, by which the former was to act as the overseer of the latter, for the year 1847, and to receive a stipulated portion of the crop for his services. The plaintiff alleges that the defendant, in the month of August, dismissed him from his employment, and this suit was instituted in November, 1847, to recover damages from the defendant, for a breach of his special contract. The defendant insisted, that the plaintiff should be nonsuited, because the action was prematurely brought; that the action could not be maintained against the defendant for a breach of the contract, until the expiration of the year 1847. We are of the opinion the court below properly overruled the motion for nonsuit. In regard to this particular class of special contracts, we adopt the rule stated by Smith, in his note to the case of Cutter v. Powell. When the overseer or agent is wrongfully dismissed from the service of his employer, he has his election of three remedies.

(1) He may bring an action, immediately, for any special injury which he may have sustained, in consequence of a breach of the contract.

(2) He may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages.

[4] Part of the opinion is omitted.

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(3) He may treat the contract as rescinded, and may immediately sue, on a quantum meruit, for the work and labor he actually performed. Cutter v. Powell, 2 Smith's Leading Cases (7th Am. Ed.) 27.

Here, the plaintiff has elected to sue immediately for the special injury, which he alleges he has sustained by the breach of the defendant's contract, as was done in the case of Masterton v. Mayor of Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. That the plaintiff might have sued before the end of the year, for any special injury which he may have sustained in consequence of the defendant's breach of the contract, I do not doubt; but inasmuch as the plaintiff in this case has alleged no other injury, arising from the breach of the contract, than that stipulated by the contract itself, to wit: the nonpayment to him of the value of his part of the crop, I have a doubt in my own mind, whether this is not substantially an action on the contract itself, to recover the plaintiff's share of the crop, stipulated by that contract, to be paid him at the end of the year. However, my brethren are very clear, that it is an action for a breach of the contract, and, as I believe substantial justice has been done between the parties by the verdict, I concur with my brethren in their judgment, in overruling the motion for a nonsuit. * * *

BALDWIN v. BENNETT.

(Supreme Court of California, 1854. 4 Cal. 392.)

This was an action brought upon an express contract, to pay the plaintiff a certain fee for legal services, with a condition that the property in question, the Tuolumne Hydraulic Association ditch, should be secured to the defendant. Services were rendered by the plaintiff, under the contract, and pending the litigation, the defendant settled the claim, and conveyed by deed his interest in the property, without the advice or knowledge of the plaintiff.

The plaintiff claimed to be entitled to the sum agreed upon by the parties, and brought suit for it.

The defendant contended that the plaintiff was only entitled to recover what his services were worth, without regard to the contract.

The jury found for plaintiff $5,000, and judgment being entered accordingly, defendant appealed.

HEYDENFELDT, J.[5] * * * The general rule as to measure of damages in an action for breach of contract, is correctly given by appellant's counsel. It "is not the whole price agreed to be paid, but the actual loss sustained, which will consist of the value of the services rendered and the damage sustained by the refusal to allow performance of the rest of the contract."

[5] Part of the opinion is omitted.

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To this rule there are, however, some exceptions. Where, from the nature of the contract (as in this case), no possible mode is left of ascertaining the damage, we will have presented the anomalous case of a wrong without a remedy, unless we adopt the only measure of damages which remains, and that is, the price agreed to be paid. Without this, justice would be defeated, and parties encouraged to violate their contracts of similar character. The defendant not only breaks his contract, but also deprives the party of showing the amount of injury under the general rule. He cannot complain that a different rule is invoked, when it is the only one left to make him responsible for his want of good faith. This reasoning was adopted in a case precisely similar, by the Supreme Court of Alabama. * * *

McMULLEN v. DICKINSON CO.

(Supreme Court of Minnesota, 1895. 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.)

See ante, p. 310, for a report of the case.[6]

HAYWARD v. LEONARD.

(Supreme Judicial Court of Massachusetts, 1828. 7 Pick. 181, 19 Am. Dec. 268.)

It appeared that the plaintiff erected a house upon the defendant's land within the time and of the dimensions stated in the contract, but that in workmanship and in materials it was not according to the terms of the agreement.[7]

PARKER, C. J.[8] * * * The point in controversy seems to be this: whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on

[6] See, also, Sutherland v. Wyer, ante, p. 228; Howard v. Daly, ante, p. 313; Liddell v. Chidester, ante, p. 319, note; Fuchs v. Koerner, ante, p. 232, note; Whitmarsh v. Littlefield, ante, p. 233; Brigham v. Carlisle, ante, p. 256; Hichhorn, Mack & Co. v. Bradley, ante, p. 258; Hitchcock v. Supreme Tent, etc., ante, p. 280, note; Dennis v. Maxfield, ante, p. 272.

In the same connection, see Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273 (1893); Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. 151 (1895); Mt. Hope Cem. A. v. Weidenmann, 139 Ill. 67, 28 N. E. 834 (1891); Gordon v. Brewster, 7 Wis. 355 (1858); and Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010 (1895).

[7] This statement is abridged from that of the official report.

[8] Part of the opinion is omitted.

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a quantum meruit for the work and labour done, and on a quantum valebant for the materials. We think the weight of modern authority is in favour of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labour of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented—there having been no prohibition to proceed in the work after a deviation from the contract has taken place—no absolute rejection of the building, with notice to remove it, from the ground; it would be a hard case indeed if the builder could recover nothing.

And yet he certainly ought not to gain by his fault in violating his contract, as he may, if he can recover the actual value; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract. * * *

It is laid down as a general position in Buller's Nisi Prius, 139, that if a man declare upon a special contract and upon a quantum meruit, and prove the work done but not according to the contract, he may recover on the quantum meruit, for otherwise he would not be able to recover at all. Mr. Dane (volume 1, p. 223) disputes this doctrine, and thinks it cannot be law unless the imperfect work be accepted. * * *

Mr. Dane's reasoning is very strong in the place above cited, and subsequently in volume 2, p. 45, to show that the position of Buller, in an unlimited sense, cannot be law; and some of the cases he puts are decisive in themselves. As if a man who had contracted to build a brick house, had built a wooden one, or instead of a house, the subject of the contract, had built a barn. In these cases, if such should ever happen, the plaintiff could recover nothing without showing an assent or acceptance, express or implied, by the party with whom he contracted. Indeed such gross violations of contract could not happen without fraud, or such gross folly as would be equal to fraud in its consequences. When we speak of the law allowing the party to recover on a quantum meruit or quantum valebant, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions.

In looking at the evidence reported in this case, we see strong

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grounds for an inference that the defendant waived all exceptions to the manner in which the work was done. He seems to have known of the deviations from the contract—directed some of them himself—suffered the plaintiff to go on with his work—made no objection when it was finished, nor until he was called on to pay. But the case was not put to the jury on the ground of acceptance or waiver, but merely on the question, whether the house was built pursuant to the contract or not; and if not, the jury were directed to consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages; for the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price, as the house was worth less on account of these departures.

BEE PRINTING CO. v. HICHBORN.

(Supreme Judicial Court of Massachusetts, 1862. 4 Allen, 63.)

BIGELOW, C. J.[9] * * * After the alleged breach of the contract in July, 1860, by the refusal of the plaintiffs to publish certain advertisements sent to them by the defendant, the latter still continued to publish advertisements in the plaintiffs' newspaper. Instead of relying on his special contract, and, when it was broken by the acts of the plaintiffs, insisting on the breach and claiming damages for its non-performance, he subsequently accepted a part performance of the contract by the plaintiffs. This severed the entirety of the contract. By his own consent, with full knowledge of the breach, the defendant received and enjoyed the benefit of the services, labor and property of the plaintiffs. Although the plaintiffs, if they failed to perform the special contract on their part, are debarred from maintaining any action upon it, yet they have a legal claim for the actual value of the labor and services performed by them, which the defendant has accepted and enjoyed. From the act of the defendant in continuing to send his advertisements to the plaintiffs for publication, after he had notice of the alleged breach by them of the special contract, and thereby taking to himself the benefit of their subsequent labor, services and material, the law implies a severance of the original entire contract, and raises a promise to pay the amount, which the plaintiffs reasonably deserve to have. Bowker v. Hoyt, 18 Pick. 555; Snow v. Ware, 13 Metc. 49; Oxendale v. Wetherell, 9 B. & C. 386; Read v. Rann, 10 B. & C. 439; 2 Greenl. Ev. § 136a. There is no allegation or proof in the present case, which tends to charge the plaintiffs with any want of good faith in the alleged failure to fulfil the special contract set up by the defendant. They are therefore well entitled to recover the fair value of their services. Snow v. Ware, ubi supra.

[9] Part of the opinion is omitted.

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In estimating the amount which the plaintiffs were entitled to have for the beneficial enjoyment of their labor and services by the defendant, it was proper for the jury to deduct the loss or damage which he had sustained in consequence of the alleged breach of the special contract. This is allowed to avoid circuity of action, so that substantial justice may be done between the parties in one suit. In this respect, the instructions were correct, and in conformity with the rule laid down by this court in Bowker v. Hoyt, ubi supra.

DOSTER v. BROWN.

(Supreme Court of Georgia, 1858. 25 Ga. 24, 71 Am. Dec. 153.)

McDONALD, J.[10] * * * The court below committed no error in arresting the argument of plaintiff's counsel, that he was entitled to recover the amount contracted to be paid to him although the work was not done, if he was prevented by the act of God from finishing it. There is no such principle. He might, in such case, be entitled, on a quantum meruit count, to recover for what materials had been furnished and the work which he had done, if it was worth anything. * * *

Such extraordinary and resistless calamities enure as an excuse and relief of both parties. If it legally releases the one from executing a work he has undertaken, it equally protects the other from paying for more than has been done.

In this case there was no proof of the value of the work done. The party relied on a special contract and sued for a stipulated price. * * *[11] Judgment for defendant.

CUNNINGHAM v. DORSEY.

(Supreme Court of California, 1856. 6 Cal. 19.)

This action was brought for $3,150 damages for breach of a contract made by plaintiff and defendants, by which plaintiff was to deliver a thousand logs (of which the plaintiff delivered five hundred) at defendants' sawmill, and for which the latter were to pay a fixed price, and for hindering the plaintiff from fully performing his part of the contract—the amount claimed being $6,400, the contract price, less an admitted payment.

The answer denies, etc., and sets up an offset of $904.68. On the trial the court, at the request of the plaintiff and under the exception of the defendants, gave the jury the following instruction, which was the third asked for: "That if the jury find from the testimony that the

[10] Part of the opinion is omitted.

[11] See, also, Preble v. Bottom, 27 Vt. 249 (1855).

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plaintiff was prevented from the full performance of his part of the contract by the acts of the defendants, that he is excused from a further performance, and the defendants become liable to pay as damages to the plaintiff the full amount agreed to be paid in the contract." The court afterwards, at defendants' request, instructed the jury that the rule was as defined in the opinion of the court. The jury found a verdict for plaintiff for $2,012.[12]

HEYDENFELDT, J.[13] * * * The third instruction given by the district court, at the request of the plaintiff, is clearly erroneous. The true rule of damages is the value of the labor performed, and the amount of profit which could fairly have been derived from the labor left unperformed by the act of the defendants. Although afterwards, at the defendants' request, the court laid down the correct rule, yet it is impossible to say that the erroneous instruction first given had no influence upon the jury. * * *

UPSTONE v. WEIR.

(Supreme Court of California, 1880. 54 Cal. 124.)

The plaintiff contracted to furnish and the defendant to receive a quantity of iron work at a stipulated price. The defendant refused afterwards to receive all that was contracted for, but the plaintiff furnished all that he would take. The court excluded evidence that the quantity actually furnished was worth $307 less than the quantity specified in the contract, and instructed the jury that the plaintiff was entitled to recover the full amount for the entire quantity. Reversed.

SHARPSTEIN, J.[14] * * * The rule, as we understand it to be, is this: The plaintiff, having sued upon the contract, is entitled to recover, for the iron work furnished, such a proportion of the whole contract price as the quantity which he furnished bears to the whole quantity contracted for; and, in addition to that, the profit which he would have made, if he had been allowed to complete his contract, together with the damages he incurred in providing means for furnishing the residue of the iron work called for by the contract, but not delivered, because of the defendant's breach.

More succinctly stated, the rule is, recompense to the plaintiff for the part performance, and indemnity for his loss in respect to the part unexecuted. * * *

If the plaintiff had chosen to waive his contract, and sue in general assumpsit for materials furnished, then his measure of damages would be the value of the iron work actually furnished. In no aspect of the case could he recover for part performance the compensation stipulated in the contract for full performance. * * *

[12] This statement is abridged from that of the official report.

[13] Part of the opinion is omitted.

[14] Part of the opinion is omitted, and the statement of facts is rewritten.

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CLARK et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York, 1850. 4 N. Y. 338, 53 Am. Dec. 379.)

Plaintiffs contracted to construct a section of the Croton Aqueduct, but were prevented from completing the work by the defendants. The estimate contemplated the removal of 150,000 yards of rock at $1 per yard. When work was stopped, 68,786 yards had been excavated, of which 6,000 yards were worth $4.20 per yard and the residue about $1.20 per yard, while the excavation not done would cost only 35 cents per yard. There was due for work done, and not paid for, $4,159.06, at $1 per yard. A judgment was found for this sum and for $16,800 for the part of the contract not completed. Reversed.

PRATT, J.[15] * * * It is clear that under the common counts the plaintiffs can not recover the same amount of damages which they might be entitled to recover in an action for a breach of the special contract. They must be confined, in this action, either to the price of the work stipulated in the contract, or the actual worth of the work done. When parties deviate from the terms of a special contract, the contract price will, so far as applicable, generally be the rule of damages. But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract and recover as damages all that he may lose by way of profits in not being allowed to fulfil the contract; or he may waive the contract and brings his action on the common counts for work and labor generally, and recover what the work done is actually worth. But in the latter case he will not be allowed to recover as damages anything for speculative profits, but the actual value of the work and materials must be the rule of damages. He can not assume the contract price as the true value of the work necessary to complete the whole job, and then recover the proportion which the work done will bear to the whole job, although it may amount to more than either the contract price or the actual value. This would be allowing indirectly a recovery for speculative profits upon the common counts. If the party seeks to recover more than the actual worth of his work, in a case where he has been prevented from performing the entire contract, he must resort to his action directly upon the contract; but when he elects to consider the contract rescinded, and goes upon the quantum meruit, the actual value is the rule of damages. The injustice of any other rule is very apparent in this case. Several different kinds of work are specified in the contract, and a specific price per yard attached to each. The plaintiffs have selected the rock excavation from the different kinds of work specified, and proved that the part performed was worth some three times as much per yard as the part remaining unperformed, and have recovered accordingly; although, had all the different kinds of work specified in the contract

[15] Part of the opinion is omitted, and the statement of facts is rewritten.

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been taken into consideration, it is quite probable that upon a general average of the work the part performed would be found no more difficult than that remaining unperformed. It is at all events quite clear, that justice could not be done without an investigation of all the different kinds of work specified. The contract is entire, and if it be resorted to at all as regulating the damages, it should only be resorted to in connection with all the kinds of work specified therein.

This question then arises: What rule did the referees in fact adopt? The special report, in giving their final conclusion, says: "The price of the rock excavation was fixed at one dollar per yard, which they have been governed by, taking the whole quantity originally required to be excavated; that they have ascertained the relative value of the whole quantity excavated and of the quantity remaining not excavated; and comparing such relative value, they find there is due from the defendants to the plaintiffs, for the portion excavated, the sum of $46,800." Although this is anything but a lucid statement, yet if it means anything it must mean that the referees neither allowed the actual value of the work performed, nor the price per yard stipulated in the contract; but assuming the estimated quantity as the whole rock excavation, they ascertained its aggregate value at one dollar per yard. They then assumed that the part performed was worth some three times as much per yard as that remaining unperformed, and assessed the damages accordingly, assuming the average value of the whole work at one dollar per yard, making an aggregate of $150,000. By this means, it will be noticed that the plaintiffs were enabled to recover for some 66,000 cubic yards of excavation nearly $113,000, a much greater sum than the cubic yards actually excavated would amount to, either at one dollar per yard or at the price per yard which the excavation was proved to be worth. At the former price the plaintiffs had received the whole amount due, into some $3,483.49, which was conceded to be due; and at the highest prices proved for the work done, there would remain due some $34,088, a sum much less than the amount found due by the referees. * * *[16]

MASTERTON v. MAYOR, ETC., OF CITY OF BROOKLYN.

(Supreme Court of New York, 1845. 7 Hill, 61, 42 Am. Dec. 38.)

See ante, p. 241, for a report of the case.

ROPER v. JOHNSON.

(Court of Common Pleas, 1873. L. R. 8 C. P. 167.)

See ante, p. 320, for a report of the case.[17]

[16] See, also, Thurston's Cases on Quasi Contracts.

[17] For the measure of damages in similar actions, see, also, Miller v. Mariner's Church, ante, p. 63; Sullivan v. McMillan, ante, p. 230; Fail &

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SECTION 2.—IN THOSE RESPECTING PERSONALTY.

I. BREACHES OF WARRANTY.

HENDRICKSON v. BACK.

(Supreme Court of Minnesota, 1898. 74 Minn. 90, 76 N. W. 1019.)

COLLINS, J.[18] * * * What is the measure of damages where there has been a breach of an implied warranty against incumbrances on personal property, and the vendee has been deprived of such property by an assertion of the paramount title or right,—in this instance, by the foreclosure of a mortgage? From the order it seems that the charge to the jury was that the vendee was entitled to recover as damages the value of the property when it was taken from him, and damages were awarded on this basis, and that in passing upon the motion the court held its charge to have been erroneous, and that it should have stated that the vendee's damages were the price paid for the chattel.

Unless we are to lose sight of the cardinal principle which governs when estimating and awarding damages in civil actions, which is simply compensation to the injured party, the court was right in its charge, and wrong when it concluded that an error had been committed. It was held in Close v. Crossland, 47 Minn. 500, 50 N. W. 694, in a case involving this very question, that the damages are the actual loss, which is the value of the chattel purchased. Of course, there might be circumstances which would affect any particular case. Under the rule established by the granting of the motion, the damages actually sustained might be more or might be less than the recovery, depending on the real value of the chattel when the paramount title was asserted as against the vendee; that is, whether the real value was more or less than the price paid. * * *

Defendant purchased in 1892, agreeing to pay $75 for the harvester and binder in question. He gave his note for this sum to his vendor, plaintiff's intestate, and the note in suit was given in renewal in 1894. The machine was mortgaged, but no claim for possession was asserted until 1895, and it was then worth but $25. Defendant had the pos-

Miles v. McRee, ante, p. 319; Brown v. Muller, ante, p. 322, note; Massie v. Bank, post, p. 593, note; United States v. Behan, ante, p. 422; Allen v. McKibbin, 5 Mich. 449 (1858); Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442 (1858); Doolittle v. McCullough, 12 Ohio St. 360 (1861); Hemminger v. W. A. Co., 95 Mich. 355, 54 N. W. 949 (1893); Heine v. Meyer, 61 N. Y. 171 (1874); Koon v. Greenman, 7 Wend. (N. Y.) 121 (1831).

[18] Part of the opinion is omitted.

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session and the use for three years, during which time the property would materially decrease in value. His actual loss when the paramount title or right was asserted was the value of the property when taken away from him, and his loss would have been the same if he had bought the machine for $10 in 1892. * * *

In conclusion, we observe that the rule above stated as the true one is in harmony with those applied where there has been a breach of warranty of quality, or where delivery of goods purchased has been refused. Order for new trial affirmed.

GROSE et al. v. HENNESSEY et al.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 389.)

The judge admitted evidence of the value of the shop, and ruled that the measure of damages, in case the jury should find that the defendants were not the owners of the shop, would be the difference in value between such title as the plaintiffs took and such title as the defendants covenanted that they had conveyed.[19]

HOAR, J.[20] * * * Upon the finding of the jury it appears that the defendants sold as a chattel a building to which they had no title, because it was a part of the realty. By the same instrument they transferred a lease of the premises of which the building formed a part, and the plaintiffs had the possession of the building under the lease. But by the sale of it as a chattel no title passed. In every sale of personal property there is an implied warranty of title. Here there was an express warranty. The rule of damages was certainly sufficiently favorable to the defendants. The difference in value between that which the defendants did convey, and that which they covenanted that they conveyed, would be the exact measure of the plaintiffs' loss by the breach of the covenant. The rules which belong to the covenants of seisin and warranty in conveyances of real property have no application. * * *

LODER v. KEKULE.

(Court of Common Pleas, 1857. 3 C. B. [N. S.] 128.)

WILLIAMS, J.[21] * * * This was an action brought to recover damages for the breach of two contracts for the sale of one hundred casks of tallow each, by the delivery of an article inferior in quality to that which was sold.

The tallow arrived by the ship Emilie in London, where the plaintiff and defendant resided, on the 12th of January, 1856. The unloading of the cargo commenced on the 16th, and was finished on the 25th, of January. As soon as the plaintiff had inspected the tallow

[19] This statement is abridged from that of the official report.
[20] Part of the opinion is omitted. [21] Part of the opinion is omitted.

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offered for delivery, he objected to the quality, as not fulfilling the terms of the contract, in a letter dated the 28th of January; and thereupon a correspondence began between him and the defendant, which continued until the 12th of March, when a resale took place by order of the plaintiff.

The price of the tallow had been paid in advance; and this action was brought to recover the difference between the contract price so paid and the amount realized by the resale.

The defendant had paid a sum of £234. into court.

The market price of tallow had fallen considerably on the 17th of January, and continued to decline until the resale on the 12th of March.

At the trial, before my Brother Willes, there was no dispute as to the breach of the contract, by delivering tallow of an inferior quality; but it was contended by the defendant, without taking any objection to the form of the declaration, that the sum paid into court was sufficient to cover the damages sustained: and this depended on the principle on which the damages ought to be estimated.

The learned judge left it to the jury to say whether the plaintiff had accepted the tallow as a delivery under the contract: and, the jury having found in the negative, the damages were assessed at a sum far exceeding that which had been paid into court, but far less than the difference between the contract price prepaid by the plaintiff, and the sum for which the tallows were resold. The jury further found that the plaintiff resold the tallow as soon as he reasonably could, and that it was properly sold.

The learned judge reserved leave to the defendant to move to enter a verdict for him, if upon the facts proved at the trial, it should appear to the court that the defendant had paid in a sum sufficient to cover the damages legally sustained by the plaintiff. * * *

We think that the prepayment cannot be taken into consideration in apportioning the damages; and that the true measure of damages would have been, if there had been nothing else in the case, the difference between the value of tallow of the quality contracted for, at the time of the delivery, and the value of the tallow actually delivered. This, however, is on the assumption that the tallow delivered could be immediately resold in the market. But, as in the present case it appears clearly from the correspondence that the defendant by his conduct delayed the resale: and, as the jury have found, we think, correctly, that the resale on the 12th of March was in a reasonable time, we are of opinion that the proper measure of damages is the difference between the value in the market of tallow of the quality contracted for on the 25th of January, and the amount made by the resale of the tallow actually delivered. * * *[22]

[22] See, also, Jones v. Just, L. R. 3 Q. B. 197 (1868); Caswell v. Coare, 1 Taunt. 566 (1809); Dingle v. Hare, 7 C. B. (N. S.) 145 (1859); Clare v. Maynard, 6 Adol. & E. 519 (1837); Lewis v. Peake, 7 Taunt. 153 (1816); Wrightup v. Chamberlain, 7 Scott, 598 (1839).

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CARY v. GRUMAN.

(Supreme Court of New York, 1843. 4 Hill, 625, 40 Am. Dec. 299.)

The price paid for the horse was $90, and the breach complained of was a disease in the horse's eyes. On the trial in the common pleas, after Gruman, the plaintiff had given evidence tending to prove the warranty and the disease, the defendant, in the course of cross-examining one of plaintiff's witnesses, enquired what the horse would have been worth at the time of the sale, if he had been sound; declaring that one object of the question was, to show the amount of the plaintiff's damages, if entitled to any, under the following rule, which he contended to be the true one, viz. "that the proper measure of damages was the difference between the real value of the horse if sound, and his real value with the defect complained of." The court, though they received the answer for another purpose, overruled it for the purpose proposed as above, holding the true measure of damages to be, the difference between the price paid, and the value with the defects.[23]

COWEN, J.[24] * * * A warranty on the sale of a chattel is, in legal effect, a promise that the subject of sale corresponds with the warranty, in title, soundness or other quality to which it relates; and is always so stated in the declaration when this is technically framed. It naturally follows that if the subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That cannot be done except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed. There is no right in the vendee to return the article and recover the price paid, unless there be fraud, or an express agreement for a return. Voorhees v. Earl, 2 Hill, 288, 38 Am. Dec. 588. Nor does it add to or detract any from the force or compass of the stipulation that the vendee may have paid a greater or less price. The very highest or the very lowest and most trifling consideration is sufficient. A promise, in consideration of $1, that a horse which, if sound, would be worth $100, is so, will oblige the promisor to pay $100 if the horse shall prove totally worthless by reason of unsoundness, and $50 if his real value be less by half, and so in proportion. Nor could the claim be enhanced by reason that the vendee had paid $1,000.

The rule undoubtedly is, that the agreed price is strong evidence of the actual value; and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it. It is sometimes the value of the article as between them, rather than its general worth, that is primarily to be looked to—a value which very likely depended on considerations which they alone could

[23] This statement is abridged from that of the official report.

[24] Part of the opinion is omitted.

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appreciate. Things are, however, very often purchased on account of their cheapness. In the common language of vendors, they are offered at a great bargain, and when taken at that offer on a warranty, it would be contrary to the express intention of the parties, and perhaps defeat the warranty altogether, should the price be made the inflexible standard of value. A man sells a bin of wheat at 50 cents per bushel, warranted to be of good quality. It is worth $1 if the warranty be true; but it turns out to be so foul that it is worth no more than 75 cents per bushel. The purchaser is as much entitled to his 25 cents per bushel in damages as he would have been by paying his dollar, and if he had given $2 per bushel he could recover no more. So, a horse six years old is sold for $50 with warranty of soundness. If sound, he would be worth $100. He wants eyesight, and thus his real value is reduced one-half. The vendee is entitled to $50 as damages; and could recover no more had he paid $200. * * *

It is impossible to say, nor have we the right to enquire, whether the real value of the horse in question, supposing him to have been sold, would have turned out to be more or less than the $90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than $80; the plaintiff then recovered $10, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth $100, the defendant would have been relieved from the payment of the $10 because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty. * * *

Reversed.[25]

PARK et al. v. RICHARDSON & BOYNTON CO.

(Supreme Court of Wisconsin, 1895. 91 Wis. 189, 64 N. W. 859.)

The plaintiffs bought of the defendant a furnace for heating their building. The furnace was warranted to work satisfactorily. It did not work satisfactorily. The court instructed the jury that, in case they found for the plaintiffs, "the plaintiffs will be entitled to recover

[25] The weight of authority is with Cary v. Gruman, ante, p. 544; Pitsinowsky v. Beardsley, Hill & Co., 37 Iowa, 9 (1873); Rutan v. Ludlam, 29 N. J. Law, 398 (1862); Merrick v. Wiltse, 37 Minn. 41, 33 N. W. 3. But cases are not lacking wherein the measure of damages has been asserted to be the difference between the price paid and the actual value. Crabtree v. Kile, 21 Ill. 180 (1859); Courtney v. Boswell, 65 Mo. 196 (1877); Crittenden v. Posey, 38 Tenn. 311 (1858). And see cases herein on the subject of "Deceit."

See, also, Stiles v. White, ante, p. 521; Peek v. Derry, ante, p. 521; White v. Miller, ante, pp. 269, 409; Foster v. Rogers, ante, p. 339.

See, also, Terry's Cases on Contracts.

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the difference between the purchase price of the furnace * * * and its actual value."[26]

NEWMAN, J.[27] When this case was here before (81 Wis. 399, 51 N. W. 572), it was said that the proper rule of damages for breach of the warranty of the furnace would be "the difference between its actual value and its value had it conformed with the warranty." This is undoubtedly the true rule. Suth. Dam. (2d Ed.) § 670; Morse v. Hutchins, 102 Mass. 440. The rule stated by the trial court is not the equivalent of the true rule. The rule of the trial court deprives the purchaser of the profit of his bargain, if he has made a good one, and gives him an undue advantage, if he has made a bad one. The furnace may have been either cheap or dear, at the price paid, even if it had conformed to the warranty. If it was a bad bargain, aside from the defects complained of, the plaintiffs' damages are less than if it had been a good bargain. This consideration is an element in the rule of damages. The question of the value of the furnace, if it had conformed to the warranty, should have been left to the jury, as well as the question of its actual value. * * *

THOMS et al. v. DINGLEY et al.

(Supreme Judicial Court of Maine, 1879. 70 Me. 100, 35 Am. Rep. 310.)

PETERS, J.[28] The defendants, manufacturers and vendors of carriage springs, sold to the plaintiffs, carriage builders, six carriage springs, knowing that the plaintiffs were to use them in the construction of carriages, and warranted them as made of the best of steel. They turned out to be of poor material, and unfit for the purpose for which they were intended and used. In this action on the warranty, the plaintiffs claim to recover, having declared therefor specially, the expenses to them of taking out of the carriages into which they were placed some of the defective springs and fitting new ones in place of them.

The common doctrine applicable to all cases is that the damages shall be the natural and proximate consequence of the act complained of. They are general damages when the necessary and natural consequence. If they are the natural but not the necessary consequence of the act complained of, then they are special damages, and must be specially set forth in the declaration. Furlong v. Polleys, 30 Me. 491, 1 Am. Rep. 635. * * *

Ordinarily, the measure of damages applying to warranty of personal property is the difference between the actual value of the articles sold and what they would have been worth if as warranted. Wright v. Roach, 57 Me. 600. But this is not an invariable standard. It is not always adequate to produce just results. There are cases where

[26] This statement is abridged from that of the official report.
[27] Part of the opinion is omitted. [28] Part of the opinion is omitted.

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more extended damages are recoverable for special or consequential or exceptional losses. * * *

Upon the principle laid down in Hadley v. Baxendale, 9 Exch. 353, it is in many cases, and we think correctly, held that where manufactured articles are ordered for a special purpose known to the seller, there is an implied warranty that they are reasonably fit and suitable for the purpose for which they are ordered, and the vendee may recover for the breach of warranty such damages as may be reasonably supposed to have been in the minds of the parties in respect to it. * * * So in the present case the warranty that the articles were of sound steel must, under the circumstances, bear the construction that the parties intended a warranty that they were suitable and fit for the particular use for which they were ordered and sold. The defendants knew, or assumed to know, of what quality of material the articles were constructed, and by their warranty relieved the plaintiffs from the necessity of personal inspection and risk. * * *

In this case we think it not unreasonable to allow the actual cost of replacing the carriage springs. * * *[29]

II. Failure to Supply Goods or to Receive Same.

GAINSFORD v. CARROLL.

(Court of King's Bench, 1824. 2 Barn. & C. 624.)

Assumpsit for the non-performance of three contracts entered into by the defendants with the plaintiff for the sale of fifty bales of bacon, to be shipped by them from Waterford, in the months of January, February, and March, 1823, respectively. The defendant suffered judgment by default, and, upon the execution of the writ of inquiry in London, the secondary told the jury that they were at liberty to calculate the damages according to the price of bacon on the day when the inquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. Parke had obtained a rule nisi for setting aside the inquiry on the ground that the plaintiff was only entitled to recover the difference between the contract price and the price which the article bore at or about the time when, by the terms of the contract, it ought to have been delivered. He cited Leigh v. Paterson, 8 Taunt. 540, in which the Court of Common Pleas intimated an opinion that the damages should be calculated according to the price of the day on which the contract ought to have been performed. This is different from the case of a loan of stock; there the lender, by the transfer deprives himself of the means of replacing the stock,

[29] See Shaw v. Smith, 45 Kan. 334; 25 Pac. 886, 11 L. R. A. 681 (1891); Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779 (1890); Reese v. Miles, 99 Tenn. 398, 41 S. W. 1065 (1897).

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he has not the money to go to market with but in the case of a purchase of goods, the vendee is in possession of his money, and he has it in his power, as soon as the vendor has failed in the performance of the contract, to purchase other goods of the like quality and description, and it is his own fault if he does not do so.

Wilde, contra, contended that the rule which had been laid down, as to the measure of damages, for not replacing stock, applied to the present, and he cited Stevens v. Johnson, 2 East, 211, and McArthur v. Lord Seaforth, 2 Taunt. 257.

PER CURIAM. Those cases do not apply to the present. In the case of a loan of stock the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here the plaintiff had his money in his possession and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss, by neglecting to do so, it is his own fault. We think that the under sheriff ought to have told the jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered.

Rule absolute.

JOSLING v. IRVINE.

(Court of Exchequer, 1861. 6 Hurl. & N. 512.)

Action against vendor for failure to deliver 3,000 gallons of naphtha. Verdict for £537. 10s.

MARTIN, B.[30] * * * The facts, as I understand them, are that the plaintiff, on the the 26th July, purchased of the defendant, by sample, 3,000 gallons of naptha, at 2s. 2d. a gallon, which the plaintiff sold on the 27th, also by sample, to Hoile & Co., for 2s. 6d. There was therefore an increase on the market price. When the naphtha was analyzed, it was found to contain 73 per cent. of benzol. The plaintiff said to the defendant, "If you had delivered the naphtha, it would have been found to contain that amount of benzol, and therefore would have been worth 5s. 6d." The real transaction was, that the defendant sold an article which was of greater value than any of the parties were aware of at the time of the sale. The plaintiff could not complete his contract with Hoile & Co. except by purchasing naphtha at this enhanced price, and that is an expense which he incurred by the defendant's default. Upon these facts, I think that the case of Randall v. Raper, E. B. & E. (96 E. C. L. R.) 84, is decisive to show that the damage which the plaintiff is liable to pay to the subpurchaser may be taken into consideration. * * *

BRAMWELL, B. * * * When a person has bought an article, and the seller does not deliver it, if the buyer can go into the market

[30] Only parts of the opinions of Martin and Bramwell, BB., are here reprinted.

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and get it elsewhere, the difference between the two prices, if any, is the measure of damage. The buyer need not go into the market the next day, but is entitled to the difference in price at the time when he might reasonably procure the article. Here it was proved that the plaintiff could not have bought naphtha of the same quality as that contracted to be sold except at an increase of price equal to the damages claimed. If one man has the sagacity to discover the value of an article which another possesses, and buys it, he is entitled to the benefit of his bargain. To hold that the buyer is bound to tell the seller the value would be to establish a rule for the benefit of the idle and ignorant. Randall v. Raper, E. B. & E. 84 (E. C. L. R. vol. 96), is distinguishable from the present case. There the seller, by delivering barley not according to contract, the defect in which could not be discovered till the barley was delivered, deprived the buyer of the opportunity of going into the market and getting other barley. * * *

Rule for new inquiry refused.[31]

BERKEY & GAY FURNITURE CO. v. HASCALL.

(Supreme Court of Indiana, 1890. 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65.)

OLDS, J.[32] * * * The facts found by the jury show that the appellee, at and just prior to August 26, 1881, had reconstructed and built his hotel building in the city of Goshen, Ind., at a cost of $40,000, that appellee was proprietor and manager thereof, and had within said hotel 30 rooms that were unfurnished, and when so unfurnished were of no use or value to the appellee; that upon said day he contracted with the appellant to sell and deliver to him * * * the necessary furniture to furnish said rooms, * * * agreed to deliver the same, and set the same up in appellee's hotel, and have the same ready for use in said hotel by or on the 15th day of September, 1881; that the appellant, at the time of the making of said contract, knew the purpose for which said furniture was to be used. * * * From these facts it necessarily follows, as a conclusion, that the party contracting to furnish the same knew that the rooms were valueless as hotel apartments when unfurnished; that the furniture was necessary to enable the purchaser to use and occupy the same, and operate his hotel; and that the appellee would be deprived of the use of such rooms for such purpose until it complied with its contract.

The facts found further show that the appellant commenced furnishing the furniture soon after the date when it was all to have been furnished and put up in the rooms, furnishing part at one time and part at an other. The facts show the appellee had reconstructed and

[31] And on general rule in an action by vendee against the vendor, see Shaw v. Holland, 15 Mees. & W. 136 (1846); Van Diemen's Land Co. v. Cockerell, 1 C. B. (N. S.) 732 (1857).

[32] Part of the opinion is omitted.

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rebuilt a valuable hotel, and was operating it himself, and the damages naturally resulting from the breach of the contract, according to the facts found, were what the rooms would have been worth to appellee furnished according to the contract more than they were worth to him unfurnished, during the delay in complying with the contract. Appellee built the house for a particular purpose, and was having it furnished for such purpose. He was not bound to rent out the rooms for another purpose, even if he could have done so. If there had been a breach and a total failure of the appellant to have furnished the whole or any part of the furniture, and the appellee had been notified that he was not intending to furnish it, then the appellant would have been liable for the difference in value of the furniture between its price in the open market and the contract price, as well as the loss of the use of the rooms for the time necessary to have procured the furniture elsewhere; but in this case the appellant furnished the furniture, and appellee accepted it, so that the damage was the loss sustained by reason of the delay.

We think the loss of the use of the rooms as they were to be furnished might fairly be considered to have been contemplated by the parties at the time of the making of the contract. In Richardson v. Chynoweth, 26 Wis. 656, it was held that a defendant failing to deliver an article, knowing the purpose for which it was purchased, was liable for the profits the purchaser would have made. * * *

The amount of damage that the appellee was entitled to recover was the difference in value to the appellee in the rooms, furnished and unfurnished, for the time they remained unfurnished by reason of appellant's failure to furnish the furniture; and that amount is determined by finding what the rooms were worth to the appellee unfurnished, and what they were worth furnished, for the time he was deprived of the use of them for the purpose for which they were to be used. The jury has found as facts that the use of the rooms unfurnished was worth nothing to the appellee during that time, and furnished they would have been worth 75 cents per day, and the number of days each room was unfurnished from the date appellant contracted to set up the furniture in the rooms is also stated and found in the verdict, and the gross amount may be determined by a mere computation. * * *

CLARK v. PINNEY.

(Supreme Court of New York, 1827. 7 Cow. 681.)

See ante, p. 357, for a report of the case.

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MARSH v. McPHERSON.

(Supreme Court of the United States, 1881. 105 U. S. 709, 26 L. Ed. 1139.)

McPherson agreed to convey certain Nebraska real estate and one-half the stock of goods in a store belonging to him in exchange for a large number of farm machines, reapers, mowers, and self-rakers, at a certain valuation, and for certain notes and cash. The defendant failed to deliver the machines in accordance with the contract, although the plaintiff had performed, failing to deliver some of the machines and delivering others in different condition than that agreed upon.

MATTHEWS, J.[33] * * * In its general charge, the court stated the rule of damages very clearly and correctly, in the following language: "The extent of the damages in this case will be the difference that it would cost to put the machines in good condition, so as to comply with the contract, and also the value of those that were not then at the time and place stated in the contract." Standing alone, this instruction would have been unexceptionable. But in the rulings noted above, in giving the tenth and eleventh instructions, asked by the plaintiff, and refusing to give that asked by the defendants, and in rejecting the evidence offered on the point, there was substantial error.

The price fixed in the contract, at which the plaintiff agreed to take the machines, whether the transaction is viewed as an exchange of property, at assumed valuations, or as a purchase and sale for money, is not conclusive, between the parties, upon the question of damages, recoverable for a breach. If there had been a total failure on the part of the defendants to comply with the contract, and they had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which, at the time of the breach, he could have supplied himself by purchase from others, with the same number of similar articles of equal value. If the market price had in the meantime advanced, the recovery would be for more, or if it had fallen, it would be for less, than the contract price; the rule to measure the loss, in such cases, being the difference between the contract and the market price. The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs; and, as to freedom from liens, the cost of removing them, if that be the difference in actual value, between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference, in the actual circumstances of the case, is shown to be, is the true rule and measure of damages. Where the articles delivered are not what the contract calls

[33] Part of the opinion is omitted.

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for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price. * * *[34]

TUFTS v. BENNETT.

(Supreme Judicial Court of Massachusetts, 1895. 163 Mass. 398, 40 N. E. 172.)

MORTON, J.[35] Action by James W. Tufts against John E. Bennett, based on a contract of sale of soda-water apparatus and machinery. * * * Part of the goods ordered were kept in stock by the plaintiff, part were to be manufactured by him, part to be purchased elsewhere, and some labor and stock were to be expended in renovating certain apparatus for the defendant. * * *

According to the contract the defendant, upon delivery, was to honor a sight draft for $400, and to execute to the plaintiff notes for the balance, and the title to the goods was to remain in the plaintiff till the notes were paid. The defendant has never honored any draft nor executed any notes, and the action is brought for the breach of his agreement in failing to do so. The court found that the defendant had repudiated the contract. The rule seems to be pretty clearly established that the measure of damages in such a case is the difference between the market value of the goods at the time and place of delivery and the market price. * * *

No evidence, however, was introduced by the plaintiff as to such difference, he relying apparently upon his contention that the measure of damages was the contract price. The only thing, therefore, which the court could do, was to award nominal damages, which it did.

SHAWHAN v. VAN NEST.

(Supreme Court of Ohio, 1874. 25 Ohio St. 490, 18 Am. Rep. 313.)

Action by Peter Van Nest against Reasin W. Shawhan to recover on a contract by which he agreed to make for Shawhan a carriage in accordance with his directions for $700, and have the same ready for delivery at his shop October 1, 1871, in consideration whereof Shawhan agreed to accept the carriage at the shop and pay the agreed price. He alleged the tender of the carriage October 1st, and the refusal of Shawhan to accept or pay for it.

[34] See, also, Lawrence v. Porter, ante, p. 222; Guetzkow Bros. v. Andrews, ante, p. 207; Kountz v. Kirkpatrick, ante, p. 336; Booth v. S. D. R. M. Co., ante, p. 203; Johnson v. Allen, ante, p. 340. And compare Hoffman v. Chamberlain, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783 (1885), and Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760 (1892).

[35] Part of the opinion is omitted.

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GILMORE, J.[36] * * * Where an action is brought by the vendor against the vendee, for refusing to receive and pay for goods purchased, the measure of damages is the actual loss sustained by the vendor in consequence of the vendee refusing to take and pay for the goods, or, in other words, the difference between the contract price and the market price at the time and place of delivery. In the authorities cited by the plaintiff in error, no distinction is drawn, or attempted to be drawn, between the sale of goods and chattels already in existence, and an agreement to furnish materials and manufacture a specific article in a particular way, and according to order, which is not yet in existence; the theory being, that in neither case would the title pass, or property vest in the purchaser, until there had been an actual delivery, and that until the title had passed, the vendor's remedy was limited to the damages he had suffered by reason of the breach of the contract by the vendee, which were to be measured by the rule above stated. In this case it is not necessary to determine whether or not a distinction, resting upon principles of law, can be drawn between ordinary sales of goods in existence and on the market, and goods made to order in a particular way, in pursuance of a contract between the vendor and vendee. The case here is of the latter kind, and the question is, whether the plaintiff below was entitled to recover the contract price of the carriage, on proving that he had furnished the materials, and made and tendered it in pursuance of the terms of the contract. * * *

In Bement v. Smith, 15 Wend. (N. Y.) 493, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, for which he promised to pay $80. The plaintiff made the sulky according to contract, and took it to the residence of the defendant, and told him he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant refused to receive it. Whereupon the plaintiff told him he would leave it with Mr. De Wolf, who lived near; which he did, and commenced suit. On the trial it was proved the sulky was worth $80, the contract price. The court charged the jury, that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the court to charge the jury that the measure of damages was not the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc. The judge declined to so charge. * * *

In Ballentine et al. v. Robinson et al., 46 Pa. 177, an agreement was made between the plaintiffs and defendants, whereby the plaintiffs were to provide materials, and construct for the defendants a six-inch steam engine, with boiler and Gifford injector and heater, in consideration whereof the defendants were to pay plaintiffs $535 in cash on the

[36] Part of the opinion is omitted.

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completion thereof. The plaintiffs complied with and completed the contract in all respects on their part, but the defendants refused to pay according to contract. * * *

The defendants' counsel asked the court to instruct the jury "that the proper measure of damages in this case is the difference between the price contracted to be paid for the engine and the market price at the time the contract was broken." The court declined to charge as requested, and instructed the jury that the measure of damages was the contract price of the engine, with interest. * * *

The Supreme Court affirmed the judgment in the case below. It will be seen that these cases are very similar, and presented the same question, and in the same manner that the question is presented in this case. Graham v. Jackson, 14 East, 498, decides the point in the same way. Mr. Sedgwick, in his work on Damages, side page 280, in speaking on this subject, says: "Where a vendee is sued for nonperformance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement; but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases that the vendor can resell them, if he sees fit, and charge the vendee with the difference between the contract price and that realized at the sale. Though perhaps more prudent it is not necessary that the sale should be at auction; it is only requisite to show that the property was sold for a fair price. But if the vendor does not pursue this course, and, without reselling the goods, sues the vendee for his breach of contract, the question arises which we have already stated, whether the vendor can recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract price in full."

The only case I have examined in which the authorities on this point are reviewed, is that of Gordon v. Norris, 49 N. H. 376. The learned judge * * * says that there is a distinction between the case of Bement v. Smith, and the ordinary cases of goods sold and delivered—viz., "the distinction between a contract to sell goods then in existence, and an agreement to furnish materials and manufacture an article in a particular way and according to order, which is not yet in existence." He recognizes Bement's Case and others of the same class as exceptions to the general rule which is to be applied in the sale of ordinary goods and merchandise which have a fixed market value; and in the syllabus of the case, the distinction is kept up and stated as follows:

"When the vendee refuses to receive and pay for ordinary goods, wares, and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price for the goods, but the difference between the

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contract price and the market price or value of the same goods at the time when the contract was broken.

"But when an artist prepares a statue or picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern, or style, or for a particular use or purpose—when he has fully performed his part of the contract, and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages, in an action against the vendee for breach of the contract, the full contract price of the manufactured article."

As has been said, we are not called upon now to determine whether the distinction as drawn in the clauses quoted, is sound on principle or not; but be that as it may, we recognize the law applicable to the case before us as being correctly stated in the clause last quoted. * * *

When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price, with interest, as damages for the breach of the contract by the defendant. Or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recovered from the defendant the difference between the contract price and what it sold for. * * *

TODD v. GAMBLE.

(Court of Appeals of New York, 1896. 148 N. Y. 382, 42 N. E. 982, 25 L. R. A. 225.)

GRAY, J.[87] This appeal presents the question of the proper measure of damages in an action against the defendants for refusing to perform their contract with the plaintiffs. By that contract the plaintiffs, who were manufacturers of chemicals, were to furnish the defendants with "whatever quantities of silicate of soda they will require to use in their factories during one year from date" at the price of $1.10 per 100 pounds, in New York. Under this agreement the plaintiffs had delivered, and the defendants had paid for, 350 barrels of the article, when the latter notified the former that they would not receive any more. * * *

For the balance of the contract year the defendants used about 2,877 barrels of silicate of soda (each barrel containing about 550 pounds), which they purchased from other parties; and under instructions from the court that the plaintiffs, if there was no market value for the article, were entitled to recover the difference between the cost of production and the contract price, the jury rendered a ver-

[87] **Part of the opinion is omitted.**

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dict for the plaintiffs against the defendants for their failure to take that amount, for damages measured by that rule. They also, upon the request of the court, made a special finding that at the time of the breach by the defendants of their contract there was no market value for silicate of soda.

The general rule for the measure of damages in the case of a breach by a vendee in the contract for the sale of an article of merchandise at a fixed price is the difference between the contract price and the market value of the article on the day and at the place of delivery. * * * That is the rule which has been recognized both in England and here. The principle upon which it rests is that of an indemnification of the injured party for the injury which he has sustained, and, in ordinary cases, the value in the market on the day forms the readiest and most direct method of ascertaining the measure of this indemnity. If the article is bought and sold in the market, the market price shows what pecuniary sum it would take to put the plaintiff in as good a position as if the contract had been performed. * * *

To justify a departure from this general rule, the facts must take the case out of the ordinary, and, if there is no such standard as a market value, the measure of the plaintiff's damage may be arrived at, in a case like the present one, by ascertaining the difference between the contract price and the cost of production and delivery. Market value, in the ordinary sense, is generally, but not always, the measure of damages, and the application of the rule necessarily must be to a case where it is shown that there is a market value for the subject of the contract of sale. * * *

The defendants proceed upon the assumption that if an article is shown to have a value, or selling price, the measure of damages must be the difference between it and the contract price, irrespective of the question of the nature of the market for it. To use their language: "If there be no market, in a restricted sense, yet, if the commodity is the subject of sale, and there is a selling price, the same rule obtains, and proof of cost should be excluded." Proceeding upon that assumption, they argue, substantially, that as there was shown to be a selling price, from the fact of there having been sales of the article by the plaintiffs, it is a controlling factor, and compels the application of the general rule for which they contend. To that proposition I think we should not assent, and I fail to find adequate support for it either in principle or in the authorities.

The general rule certainly can have no application to the case of a breach of a contract for the manufacture and sale of a commodity, unless it is made to appear that upon the breach by the vendee the vendor could have placed the commodity upon the market, and, by thus disposing of it, have relieved himself from the consequences of the defendants' default. The principle of indemnity upon which the rule rests would be satisfied in such a case, and the vendor would be con-

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fined for his recovery to the difference between a known market value at the time of the breach of the contract and the price fixed by the contract. * * * What must the parties be deemed to have contemplated in the present case? The defendants bound the plaintiffs, through this contract, to supply all the silicate of soda which they would require for the year. The plaintiffs, with ample capacity for supplying the article, contemplated that their production would be increased by the amount which the defendants would take from them during the year. * * *

Of course, they must have contemplated a profit to the plaintiffs if they could manufacture at a cost under the contract price. It is absurd to say, in view of the evidence, that there was a market value, in the ordinary sense of the term, for silicate of soda, and, perhaps, the defendants do not seriously argue that there was. But if we are to hold, in accordance with their views, because there was a price at which the plaintiffs had been able to effect sales of the article at the time of the breach, that that fact must be controlling in fixing the measure of damages, we should be doing a great injustice, and we should be establishing a commercial rule, which would work injuriously in cases where, like the present one, the subject of sale between the parties is an article perishable in its nature, when kept for any length of time, having but a limited demand, and no real market, and only manufactured in any quantities upon orders by consumers. * * *

Affirmed.

WHITE v. SOLOMON.

(Supreme Judicial Court of Massachusetts, 1895. 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.)

HOLMES, J.[38] This is an action upon the following contract:

* * * * * * * * * *

"Messrs. J. T. White & Co., Publishers, New York—Gentlemen: Please deliver, according to shipping directions given below, one White's Physiological Manikin, Medical Edition, price $35.00. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35.00, as follows: $10.00 upon delivery at the express office, and the balance in monthly payments of $5.00, each payable on the first of each and every month thereafter, until the whole amount is paid, for which the publishers are authorized to draw when due.

"It is expressly hereby agreed that, in case of the failure to pay any one of the said installments after maturity thereof, all of said installments remaining unpaid shall immediately become due and payable, and the said James T. White & Co. may take, or cause to be taken, the said manikin from the possession of the said subscriber or their rep-

[38] Part of the opinion is omitted.

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resentatives, to whom he may have delivered the same, without recourse against said James T. White & Co. for any money paid on account thereof; it being expressly agreed that the money paid on account shall be for the use and wear of said manikin. * * *

"James M. Solomon, 75 Court Street."

The manikin was delivered, as agreed, to the express company, freight prepaid; that the defendant refused to receive it; that, in consequence, the express company, after a time, left the manikin at the plaintiffs' place of business, in pursuance of a rule of the company, and without the plaintiffs' assent; and that it is held subject to the defendant's order. * * *

In an ordinary contract of sale, the payment and the transfer of the goods are to be concurrent acts; and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and, although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly solvendum in futuro), of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words "in consideration of delivery" are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. * * *

When, as here, by the terms of the contract, every condition has been complied with which entitles the vendors to the whole sum, and, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot, by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See Smith v. Bergengren, 153 Mass. 236, 238, 26 N. E. 690, 10 L. R. A. 768.

If the first payment of $10 upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to accept the manikin or to pay the $10, the sellers' only remedy would be for a breach, and that they could not leave the manikin at his house, and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company, and the provision for payment of $10 "upon delivery at the express office" must mean after the delivery; so that the delivery is the first act, and by itself, without more, fixes the rights of the vendors to the price,

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just as the transfer of the stock did in Thompson v. Alger, 12 Metc. (Mass.) 428, 444. * * *

FIELD, C. J. (dissenting).[39] It is not easy, perhaps, to reconcile all our decisions upon the measure of damages in actions for goods bargained and sold or for goods sold and delivered; but the general rule is, I think, that where the title passes to the vendee by the contract, and the contract has been executed by a delivery, or by what is equivalent to a delivery, the vendee is liable to the vendor for the price; but where the title does not pass to the vendee by the contract, and he declines to receive and accept the goods sold, the damages are the injury suffered from the breach, which usually is the difference between the price agreed upon and the market value of the goods at the time and place of delivery. * * *

It becomes necessary in the present case to consider the nature of the contract. The contract, I think, is in effect a contract for a conditional sale, and the intention is that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract, the plaintiff is authorized to retake the manikin without being accountable to the defendant for any of the money paid by him on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article, and it is returned to and retained by the vendor? I think that the construction to be given to the contract is that, if the defendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant, and retain what he has paid on account of the price, or that they may leave the manikin in the possession of the defendant, and sue him for the installments of the price which remain unpaid. But the plaintiffs cannot collect the whole price, and also retake the manikin. They cannot hold the title to the property, and also recover the price of it. * * *

The damages to be recovered when a vendee, in a conditional contract of sale, refuses to receive the property, and it is returned to the vendor by his assent, and is retained by him, seems to me analogous to the damages to be recovered when a vendee in an executory contract of sale refuses to receive the property. Morse v. Sherman, 106 Mass. 430–434; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172. See Tufts v. Grewer, 83 Me. 407, 22 Atl. 382. The title in each case remains in the vendor; and the damages, when the thing sold is a commodity usually bought and sold in the market, are generally the difference between the price agreed to be paid and the market value of the property at the time and place of delivery. In my opinion, such should be the rule in this case. * * *

[39] Part of the dissenting opinion is omitted.

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HOSMER v. WILSON.

(Supreme Court of Michigan, 1859. 7 Mich. 294, 74 Am. Dec. 716.)

One of defendants had called at plaintiff's foundry, and there signed a written order for an engine, to be paid for when taken out of the shop. Plaintiff's clerk accepted the order. Plaintiff then proceeded to make such engine, and only stopped when he received a letter from defendants countermanding the order.

CHRISTIANCY, J.[40] * * * In the case of a contract for a certain amount of labor, or for work for a specified period—when the labor is to be performed on the materials or property, or in carrying on the business, of the defendant, or when the defendant has otherwise accepted or appropriated the labor performed, if the defendant prevent the plaintiff from performing the whole, or wrongfully discharge him from his employment, or order him to stop the work, or refuse to pay as he has agreed (when payments become due in the progress of the work), or disable himself from performing, or unqualifiedly refuse to perform his part of the contract, the plaintiff may, without further performance, elect to sue upon the contract and recover damages for the breach, or treat the contract as at an end, and sue in general assumpsit for the work and labor actually performed: Hall v. Rupley, 10 Pa. 231; Moulton v. Trask, 9 Metc. (Mass.) 579; Derby v. Johnson, 21 Vt. 21; Canada v. Canada, 6 Cush. (Mass.) 15; Draper v. Randolph, 4 Har. (Del.) 454; Webster v. Enfield, 5 Gilman (Ill.) 298.

And in such cases he may, it would seem, under the common indebitatus count, recover the contract price, where the case is such that the labor done can be measured or apportioned by the contract rate; or whether it can be so apportioned or not, he may under the quantum meruit recover what it is reasonably worth. But in all such cases, the defendant, having appropriated and received the benefit of the labor (or, what is equivalent, having induced the plaintiff to expend his labor for him, and, if properly performed according to his desire, the defendant being estopped to deny the benefit), a duty is imposed upon the defendant to pay for the labor thus performed. This duty the law enforces under the fiction of an implied contract, growing out of the reception or appropriation of the plaintiff's labor.

It is therefore evident, first, that in all the cases supposed, an implied contract would have arisen, and the plaintiff might have recovered upon a quantum meruit, if no special contract had ever been made; second, that in the like cases (where the value of the work done could not, as it probably could not in the case before us, be apportioned by the contract price) the value or fair price of the work done, would necessarily constitute the true measure of damages. And in all such cases, as first supposed, either the contract price, or the reasonable worth of the labor done, would measure the damages.

[40] Part of the opinion is omitted.

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Similar considerations and like rules would, doubtless, equally apply to contracts for furnishing materials, and for the sale and delivery of personal property, when, after part of the materials or property has been received and appropriated by, or vested in the defendant, he has prevented the plaintiff from performing, or authorizing him to treat the contract as at an end, on any of the grounds above mentioned.

But the case before us stands upon very different grounds. Here the contract, as claimed to have been proved, was in no just sense a contract for work and labor, nor could the plaintiff, while at work upon the engine, be properly said to be engaged in the business of the defendants. It was substantially a contract for the sale of an engine, to be made and furnished by the plaintiff, to the defendants, from the shop, and, of course, from the materials of the plaintiff. The defendants had no interest in the materials, nor any concern with the amount of the labor. They were to pay a certain price for the engine when completed. Engines, it is true, are not constructed without labor; the labor, therefore, constitutes part of the value of the engine. But this would have been equally true if the contract in this case had been for an engine already completed.

The labor of the plaintiff was upon his own materials, to increase their value, for the purpose of effecting a sale to defendants when completed. No title in any part of the materials was to vest in defendants till the whole should be completed by plaintiff, and delivered to defendants. The plaintiff might have sold any of the materials, after the work was performed, or the whole engine when completed, at any time before delivery to, or acceptance by, defendants.

Whether, therefore, the labor actually performed on these materials, when the defendants refused to go on with the contract, or prevented the further performance, had enhanced or diminished the value of the materials, and how much, would be a necessary question of fact, in arriving at any proper measure of damages. The value of the work and labor does not, therefore, in such a case, constitute the proper criterion or measure of damages. If the value of the materials has been enhanced by the labor, the plaintiff, still owning the materials has already received compensation to the extent of the increased value; and to give him damages to the full value of the labor, would give him more than a compensation. If the value of the materials has been diminished, the value of the labor would not make the compensation adequate to the loss. It would be only in the single case where the materials have neither been increased nor diminished by the labor, that the value of the labor would measure the damages. Such a case could seldom occur, and whether it could or not, in must always be a question of fact in the case, whether the value of the materials does remain the same, or whether it has been increased, or diminished, and to what extent.

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Again, as the defendants never received the engine, nor any of the materials, the title and possession still remained in the plaintiff, and the defendants never having received or appropriated the labor of the plaintiff, if the same work had been performed under the like circumstances, without any actual or special contract, the law would have imposed no duty upon the defendants, and therefore implies no contract on their part to pay for the work done: 1 Chit. Pl., 382; Atkinson v. Bell, 8 B. & C., 277; Allen v. Jarvis, 20 Conn. 38.

The only contract, therefore, upon which the plaintiff can rely to pay him for the labor, is the special contract. No duty is imposed upon the defendants otherwise than by this. This contract, therefore, must form the basis of the plaintiff's action. He must declare upon it, and claim his damages for the breach of it, or for being wrongfully prevented from performing it. His damages will then be the actual damages which he has suffered from the refusal of the defendants to accept the articles, or in consequence of being prevented from its performance; and these damages may be more or less than the value of the labor. * * *[41]

SECTION 3.—IN THOSE RESPECTING REALTY.

I. Vendor's Failure to Give Title.

(A) Refusal to Convey.

FLUREAU v. THORNHILL.

(Court of King's Bench, 1776. 2 W. Bl. 1078.)

The plaintiff bought at an auction a rent of £26. 1s. per ann. for a term of thirty-two years, issuing out a leasehold house, which let for £31. 6s. The sale was on the 10th of October, 1775. The price at which it was knocked down to him was £270, and he paid a deposit of 20 per cent., or £54. On looking into the title, the defendant could not make it out; but offered the plaintiff his election, either to take the title with all its faults, or to receive back his deposit with interest and costs. But the plaintiff insisted on a farther sum for damages in the loss of so good a bargain; and his attorney swore, he believed the plaintiff had been a loser by selling out of the stocks to pay the purchase money, and their subsequent rise between the 3d and the 10th of November; but named no particular sum. Evidence was given by

[41] See, also, Hinckley v. P. B. S. Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967 (1887); Lever v. D. C. Co., 43 Law Times R. (N. S.) 706 (1880); Dunlop v. Grote, 2 Car. & K. 153 (1845); Kadish v. Young, ante, p. 225.

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the defendant, that the bargain was by no means advantageous, all circumstances considered; and the auctioneer proved that he had orders to let the lot go for £250. The defendant had paid the deposit and interest, being £54. 15s. 6d. into court: But the jury gave a verdict, contrary to the directions of De Grey, C. J., for £74. 15s. 6d., allowing £20 for damages.

DE GREY, C. J. I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost.

BLACKSTONE, J., of the same opinion. These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. For curiosity, I have examined the prints for the price of stock on the last 3d of November, when three per cent.'s sold for 87½. About £310. must therefore have been sold to raise £270. And if it costs £20. to replace this stock a week afterwards (as the verdict supposes), the stocks must have risen near seven per cent. in that period, whereas in fact there was no difference in the price. Not that it is material; for the plaintiff had a chance of gaining as well as losing by a fluctuation of the price.[42]

HOPKINS v. GRAZEBROOK.

(Court of King's Bench, 1826. 6 Barn. & C. 31.)

The vendor, who had contracted to purchase an estate, but who had not yet obtained a conveyance, put up the estate for sale by auction and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him. The vendor acted bona fide, believing that he could make title when required. Action for damages by the vendee.*

ABBOTT, C. J. Upon the present occasion I will only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration. But the circumstances of this case show that it differs very materially

[42] The doctrine of Flureau v. Thornhill, 2 W. Bl. 1078 (1775), does not apply in case the vendor, having power to do so, does not convey. Engel v. Fitch, L. R. 3 Q. B. 314 (1868); Western R. Corp. v. Babcock, 6 Metc. (Mass.) 346 (1843); Tracy v. Gunn, 29 Kan. 508 (1883). Nor in case he has contracted, in view of defects, to complete his title. Taylor v. Barnes, 69 N. Y. 430 (1877). Nor in case the transaction was an exchange of land. Devin v. Himer, 29 Iowa, 297 (1870).

*The statement of facts is rewritten.

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from that which has been quoted from Sir W. Blackstone's Reports. There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase money with interest; here, no such offer was or could be made. The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract.

BAYLEY, J. The case of Flureau v. Thornhill, 2 W. Bl. 1078, is very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted.

HOLROYD and LITTLEDALE, JJ., concurred.[43]

BAIN v. FOTHERGILL.

(House of Lords, 1874. L. R. 7 H. L. Cas. 158.)

The defendants contracted to sell to plaintiffs a mining royalty then held by the executors of one Hill, who had to obtain the consent of the lessors thereof to assign the same. The defendants did not mention the necessity of obtaining the consent, and were subsequently unable to obtain it, whereupon this action was begun for breach of the defendants' contract to convey. The defendants acted with bona fides.

Lord CHELMSFORD.[44] My lords, this appeal brings in review before your lordships the case of Flureau v. Thornhill, 2 Wm. Bl. 1078, and other cases which have engrafted exceptions upon it; and the first question to be considered is whether that case was rightly decided. The decision took place very nearly a century ago, in the year

[43] Parke, B., in Robinson v. Harman, 1 Exch. 855 (1848):

"The next question is, what damages is the plaintiff entitled to recover? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of Flureau v. Thornhill, 2 W. Bl. 1078, qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from Hopkins v. Grazebrook, 6 B. & C. 31."

[44] Part of the opinion is omitted, and the statement of facts is rewritten.

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1775, and has been followed ever since; not, however, without an occasional expression of doubt as to its soundness. * * *

Now, the rule established by Flureau v. Thornhill, 2 Wm. Bl. 1078, is, that upon a contract for the purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. * * *

The rule and the reason for it have been adopted and followed in subsequent cases. In Walker v. Moore, 10 Barn. & C. 416, where the plaintiff contracted with the defendant for the purchase of a real estate; the vendor, acting bona fide, delivered an abstract shewing a good title, and the plaintiff, before he compared it with the original deeds, contracted to sell several portions of the property at a considerable profit. Upon an examination of the abstract with the deeds it was found that the title was defective. The plaintiff refused to complete his purchase, and brought his action claiming, amongst other damages, the profit that would have accrued to him from the resale of the property. It was held that he was not entitled to these damages. * * *

In a more recent case of Engel v. Fitch, 3 Q. B. 314, in error, 4 Q. B. 659—to which I shall presently have occasion more particularly to refer—Lord Chief Justice Cockburn, in an elaborate judgment, expressed his opinion that the case of Flureau v. Thornhill, 2 Wm. Bl. 1078, was unsatisfactory, and gave his sanction to Lord Chief Justice Abbott's doubt as to the soundness of the decision in that case.

There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment in Flureau v. Thornhill; but, in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision: "The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a resale appears to me to be a consequence too remote from the breach of the contract. I am aware that in Engel v. Fitch, 3 Q. B. 314, in error 4 Q. B. 659—where, after the contract, and before the breach of it, the purchaser contracted for a resale at an advance of £105., the Court of Queen's Bench and the Court of Exchequer Chamber, though pressed with the decision in Hadley v. Baxendale, 9 Exch. 341, held that, "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case." But it must be borne in mind that this question as to damages depends, as Baron Alderson said in Hadley v. Baxendale, 9 Exch. 341, upon what "may reasonably be supposed to have been in the contemplation of both parties at the time they made

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the contract as the probable result of the breach of it." Now, although the purchaser in Engel v. Fitch, 3 Q. B. 314, in error 4 Q. B. 659, when he entered into the contract may have contemplated a resale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The judges were no doubt influenced by the fact of the profitable resale having actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract.

The decision in Flureau v. Thornhill, 2 Wm. Bl. 1078, derives great additional authority from the opinion of Lord St. Leonards, who, in his work on the Law of Vendors and Purchasers (14th Ed. p. 360), considers that it was rightly decided.

The almost unanimous approval of the decision in Flureau v. Thornhill, 2 Wm. Bl. 1078, was broken in upon by an an expression of disapprobation from Chief Justice Abbott in the case of Hopkins v. Grazebrook, 6 Barn. & C. 31, to which I have already alluded. * * *

The decision itself in Hopkins v. Grazebrook, 6 Barn. & C. 31, cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbott, that "the defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in Hopkins v. Grazebrook, 6 Barn. & C. 31, did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in Flureau v. Thornhill, 2 Wm. Bl. 1078, and as having withdrawn from its operation a class of cases where a person, knowing that he has no title to real estate, enters into a contract for the sale of it. It is not correct to say with Lord St. Leonards in his Vendors and Purchasers (14th Ed., p. 359) that Hopkins v. Grazebrook, 6 Barn. & C. 31, has not been followed. * * *

But in the case of Engel v. Fitch the Court of Queen's Bench (3 Q. B. 314), and afterwards the Exchequer Chamber (4 Q. B. 659, 664), proceeded expressly on the cases of Hopkins v. Grazebrook, 6 Barn. & C. 31, and Robinson v. Harman, 1 Exch. 850, the Chief Baron quoting the very words of the Lord Chief Justice, and relying on those cases. * * * It was after this decision in Engel v. Fitch that the plaintiffs in error declined to argue the present case in the Exchequer Chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal. The case therefore comes to your lordships' house without the advantage of the opinions of the learned judges of that court.

Notwithstanding the repeated recognition of the authority of Hopkins v. Grazebrook, 6 Barn. & C. 31, I cannot, after careful considera-

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tion, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by Flureau v. Thornhill, 2 Wm. Bl. 1078, with respect to damages upon the breach of a contract for the sale of a real estate, for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the court in Hopkins v. Grazebrook, 6 Barn. & C. 31, engrafted upon the rule in Flureau v. Thornhill, 2 Wm. Bl. 1078, has always been taken to be this: that in an action for breach of a contract for the sale of a real estate if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain.

In Sedg. Dam. (4th Ed.) p. 234, mentioned by Mr. Baron Martin, in his judgment in this case, after a reference to the general rule as to damages, it is said: "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him with interest and expenses. In the latter, he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts bona fide, and where his conduct is tainted with fraud or bad faith, is not to be "justified or explained on principle." * * *

Upon a review of all the decisions on the subject, I think that the case of Hopkins v. Grazebrook, 6 Barn. & C. 31, ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule as established by Flureau v. Thornhill, 2 Wm. Bl. 1078, or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.

It is only necessary to add that, in my opinion, if there were any exceptional cases from the rule in Flureau v. Thornhill, 2 Wm. Bl. 1078, the present case would not fall within any of them, but is within

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the rule itself. The respondents, when they entered into the contract for the sale of Miss Walter's royalty, had an equitable title to the mine which they might have perfected by obtaining the lessors' consent to the assignment to them. This consent had not been obtained at the time the contract was entered into, and the fact was not communicated to the intended purchaser. The reason for this non-communication is stated in the case to be, that "either it did not cross the mind of the respondent Fothergill, or, if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was therefore a matter of no importance." There is no reason to think that the respondents were not acting throughout under a bona fide belief that the lessors' consent might be obtained at any time upon application. They were prevented performing their contract, not from any fraud or wilful act on their part, but by an unexpected defect in their title which it was beyond their power to cure.

HOPKINS v. LEE.

(Supreme Court of United States, 1821. 6 Wheat. 109, 5 L. Ed. 218.)

This was an action of covenant, brought by the defendant in error, Lee, against the plaintiff in error, Hopkins, to recover damages for not conveying certain tracts of military lands, which the plaintiff in error had agreed to convey, upon the defendant in error relieving a certain incumbrance held by one Rawleigh Colston, upon an estate called Hill and Dale.

LIVINGSTON, J.[45] * * * In the assessment of damages, the counsel for the plaintiff in error prayed the court to instruct the jury that they should take the price of the land, as agreed upon by the parties in the articles of agreement upon which the suit was brought, for their government. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an action by the vendee for a breach of contract, on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to

[45] Part of the opinion is omitted.

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have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. * * * Affirmed.

PUMPELLY v. PHELPS.

(Court of Appeals of New York, 1869. 40 N. Y. 59, 100 Am. Dec. 463.)

The defendant, having the power to convey the land upon the written consent of his cestui que trust, contracted to sell to plaintiff a certain lot in Stratford, presuming that she, as she previously had done on similar occasions, would give her consent on its being asked for. She, however, refused to give her assent. The plaintiff recovered substantial damages below.

MASON, J.[46] There has never seemed to me to have been any very good foundation for the rule, which excused a party from the performance of his contract, to sell and convey lands, because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule itself is based.

In England, the rule seems to have been sustained upon the ground of an implied understanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. * * *

While in this country the rule is based upon the analogy between this class of cases and actions for breach of covenant of warranty of title. Baldwin v. Munn, 2 Wend. 399, 20 Am. Dec. 627; Peters v. McKeon, 4 Denio, 546. * * *

The reasons assigned for this rule in actions for a breach of covenant of warranty of title can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title, and that perhaps he may never get it; and if he will go on and make expenditures under such circumstances it is his own fault; and besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase in the value of the property as there is in these covenants in deeds, which run with the land through all time. * * *

Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. * * *

These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated.

[46] Part of the opinion is omitted, and the statement of facts is rewritten.

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I have referred to this matter simply as furnishing an argument against in any degree extending the rule, and as a reason for limiting it strictly where the already adjudged cases in our own courts have placed it. It becomes important in this connection to inquire what that limit is. The general rule certainly is that where the vendor has the title and for any reason refuses to convey it, as required by the contract, he shall respond in law for the damages, in which he shall make good to the plaintiff what he has lost by his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach, as profits or advantages which are the direct and immediate fruits of the contract. * * *

Where however the vendor contracts to sell and convey in good faith, believing he has good title, and afterward discovers his title is defective, and for that reason without any fraud on his part, refuses to fulfill his contract, he is only liable to nominal damages for a breach of his contract. * * *

The rule is otherwise however where a party contracts to sell lands which he knows at the time he has not the power to sell and convey; and if he violates his contract in the latter case, he should be held to make good to the vendee the loss of his bargain, and it does not excuse the vendor, that he may have acted in good faith and believed, when he entered into the contract, that he should be able to procure a good title for his purchaser. * * * Affirmed.

MARGRAF v. MUIR.

(Commission of Appeals of New York, 1874. 57 N. Y. 155.)

The defendant, widow of A. Muir and mother of six children, three of them minors, contracted to sell the lot in question, knowing that it belonged to the children by descent, and that she would have to obtain a right to convey by court proceedings. There was also an outstanding tax title. The lot was worth $2,000, and the contract called for but $800. Specific performance was refused as inequitable, but damages were awarded in the sum of $1,200.

EARL, C.[47] * * * The referee allowed the plaintiff as damages the difference between the contract-price and the value of the land, thus placing him in the position he would have been if the contract had been performed. In this I think he erred. The general rule in this state, in the case of executory contracts for the sale of land, is that in the case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase-money, in which case he can also recover such purchase-money and interest. * * *

But to this rule there are some exceptions based upon the wrongful conduct of the vendor, as if he is guilty of fraud or can convey, but

[47] Part of the opinion is omitted, and the statement of facts is rewritten.

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will not either from perverseness or to secure a better bargain, or if he has covenanted to convey when he knew he had no authority to contract to convey; or where it is in his power to remedy a defect in his title and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfill his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. Here no fraud was perpetrated on the vendee. He knew that the vendor did not have title to the lands, and that she could not convey to him without authority from some court; and he, knowing that the land was worth $2,000, may be presumed to have known that no authority could be obtained to convey the land for $800, without in some way practicing an imposition upon the court. This latter knowledge she did not have. Believing, as she did, that $800 was a fair price for the land, she had no reason to doubt that she could obtain authority to convey. Further than this, he knew that the land had been sold for taxes and a lease given. This she did not know. Under these circumstances, she could not get authority from the court to make a conveyance upon behalf of her minor children, and it appears that she could not procure the tax title. Hence, there is no ground for imputing to her any blame for not making such a conveyance as her contract called for. These facts do not call for the application of an exceptional rule of damages in this case.

The case of Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463, is the widest departure from the general rule of damages in such case that is to be found in the books. In that case it was held, that where the vendor, in an executory contract for the conveyance of land, knew at the time he made the contract that he had no title, although he acted in good faith, believing that he could procure and give the purchaser a good title, he was yet liable for the difference between the contract-price and the value of the land. But there are two features which distinguish this case from that. In that case, the vendee did not know that the vendor had no title. Here, he did know it, and he knew also that she could get no title without imposing upon some court. Here also, even if she could have procured the authority of some court to convey, she still would have been unable to give such a title as her contract called for, on account of the outstanding tax title which was unknown to her when she contracted and which she could not procure. * * *

The recovery should have been confined to the purchase-money paid ($25) and the interest thereon.

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HAMMOND v. HANNIN.

(Supreme Court of Michigan, 1870. 21 Mich. 374, 4 Am. Rep. 490.)

COOLEY, J.[48] * * * On September 10, 1864, Hammond contracted to sell to Hannin an eighty-acre lot in the county of Van Buren for the sum of $500. * * *

The legal title to the land appears to have been, at the time the contract was entered into, in one John M. Gordon, an insane person, of whom one Mickle was committee. T. W. Mizner, Esq., of Detroit, was acting as agent for Mickle, and as such sold the lands to Hammond, who appears to have purchased in good faith, and in the belief that he was to obtain a good title. The conveyance, however, was not yet made. Hannin paid Hammond the whole amount of the purchase money agreed to be paid by her, except one hundred and three dollars, and on September 14, 1866, tendered payment of this sum and demanded title; but Hammond having at that time discovered that Mickle had no authority, as committee, to make sale of lands in Michigan, declined to execute a deed on this ground, and Hannin then brought action against him to recover damages for breach of his contract to convey. * * *

Upon the principal question, the court below ruled that the plaintiff was entitled * * * to recover the profits which she would have made by the good bargain she had lost, if such it proved to be.

There is no doubt that the instruction given by the court is correct as a general rule. Where a breach of contract occurs, the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled. * * *

And where the carrying out of the contract would have given one of the contracting parties the enjoyment of a particular thing, and he has lost it, the damages he will be entitled to are the value of that which he has lost. See Engel v. Fitch, L. R. 3 Q. B. 314.

To this general rule, which is so entirely undisputed as to make further citation of authority superfluous, an exception was introduced in the case of contracts for the sale of land by the decision in Flureau v. Thornhill, 2 W. Bl. 1078. * * *

Upon this exception to the general rule subsequent cases have ingrafted some other exceptions. * * *

The principle underlying these cases is that, if a party enters into a contract to sell knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by Flureau v. Thornhill does not apply. So if a person undertakes that a third party shall convey, and is unable to fulfill his contract, the authorities are that he shall pay full damages. Such contracts are speculative in char-

[48] Part of the opinion is omitted.

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acter, and the party giving them understands the risk he assumes when the covenant is entered into. * * *

There are also numerous cases which decide that if the vendor acts in bad faith—as if, having title, he refuses to convey, or disable himself from conveying—the proper measure of damages is the value of the land at the time of the breach; the rule in such case being the same in relation to real as to personal property. * * *

And the cases before referred to in which a party undertook to sell that which he did not own, and knew he could not control, may also, where the other party is not informed of the defect, be considered as involving a degree of bad faith, and have generally been so regarded by the courts.

But, on the other hand, if the contract of sale was made in good faith, and the vendor for any reason is unable to perform it, and is guilty of no fraud, the clear weight of authority is that the vendee is limited in his recovery to the consideration money and interest, with perhaps, in addition, the costs of investigating the title. * * *

There are some cases which disregard the exception introduced by Flureau v. Thornhill, and which, treating the question of good or bad faith in the vendor as an unimportant circumstance, hold that the measure of damages on breach of a contract to convey lands should be the same as on breach of a contract for a sale of personalty. It is remarkable that, though this general subject has been very fully discussed in the English cases, and in many of the American cases referred to, the cases opposed to them appear generally to have entirely overlooked that discussion, and are evidently decided on first impression and without that investigation and reflection which so important a subject usually receives. * * *

One very strong reason for limiting the recovery to the consideration money and interest in cases free from bad faith is that the measure of damages is thus made to conform to the rule where the party assumes to convey land which he does not own, and an action is brought against him on the covenants of title contained in his deed. This reason is made specially prominent in many of the cases; and it cannot be denied that it is an anomaly if the vendee is restricted to the recovery of one sum when an ineffectual deed is given, but allowed to recover a larger compensation in case the vendor, when he discovers the defect in his title, has the manliness to inform the vendee of the fact, and to decline to execute worthless papers. Had Hammond executed and delivered a deed when it was called for, the present controversy could not have arisen; and his failure to do so, which worked no additional wrong to the vendee, and was all that he could do consistent with good faith and honorable conduct, is the only ground upon which the plaintiff can claim to retain the large damages for the loss of her bargain which were awarded her in the present case. So long as the rule stands which thus limits the damages in suits upon the covenants of title, so long ought we also, I think, to adhere to the deci-

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sions which restrict the recovery, as above stated, in actions upon contracts to convey.

It remains to inquire whether the vendee in the present case is entitled, under the decisions, to recover damages for the loss of her bargain, either on the ground that the vendor assumed to sell what he knew he did not own, or that he has acted in bad faith. The vendor's good faith in the whole transaction was fully conceded on the trial. * * * When, therefore, the circuit judge laid down a general rule which made the belief or good faith of the defendant unimportant, and which would give the vendee in every case a compensation for the loss of his bargain, where for any reason the vendor fails to perform, I think he erred, and that the judgment should be reversed, and a new trial ordered.[49]

(B) Breach of Covenants of Seisin and Quiet Enjoyment.

STAATS v. TEN EYCK'S EX'RS.

(Supreme Court of New York, 1805. 3 Caines, 111, 2 Am. Dec. 254.)

On the 7th of January, 1793, the testator, Barent Ten Eyck, by indenture of release, in consideration of £700, granted, bargained, and sold to the plaintiff, and one Dudley Walsh, in fee, two lots of ground in the city of Albany, covenanting, "that he, the grantor, was the true and lawful owner; that he was lawfully and rightfully seised, in his own right, of a good and indefeasible estate of inheritance in the premises; that he had full power to sell in fee simple, and that the grantees should forever peaceably hold and enjoy the premises without the interruption or eviction of any person whatever, lawfully claiming the same." In the month of May following, Walsh, for a valuable consideration, conveyed his moiety of these lots to Staats, who, on the 30th of October, 1802, after due possession, by lease and release, granted one of them to Margaret Chim in fee, and covenanted to warrant and defend her in the peaceable possession thereof. In August, 1803, an ejectment was brought against Margaret Chim, in which a judgment was obtained for a moiety of the lot sold to her, execution sued out, and this followed by a recovery in an action for the mesne profits. The value of the lot, from the moiety of which Margaret Chim was thus evicted, was, at the time of the sale by Ten Eyck, £300, and that was the consideration paid for it. Margaret Chim, being

[49] Flureau v. Thornhill, 2 W. Bl. 1078 (1775), is followed in some American states, as in Burk v. Serrill, 80 Pa. 413, 21 Am. Rep. 105 (1876); is modified in others to conform to Hopkins v. Grazebrook, 6 Barn. & Cres. 31 (1826), Foley v. McKeegan, 4 Iowa, 1, 66 Am. Dec. 107 (1856), and Sweem v. Steele, 5 Iowa, 352 (1857); and is repudiated in toto in probably the majority of jurisdictions, as in Doherty v. Dolan, 65 Me. 87, 20 Am. Rep. 677 (1876), and Plummer v. Rigdon, 78 Ill. 222, 29 Am. Rep. 261 (1875).

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thus evicted, brought her action against the plaintiff, and recovered for the moiety she had lost.[50]

KENT, C. J.[51] * * * There are two covenants contained in the deed; the one, that the testator was seised in fee, and had good right to convey; the other, that the grantee should hold the land free from any lawful disturbance or eviction. The present case does not state distinctly whether the eviction was founded upon an absolute title to a moiety of one lot, or upon some temporary encumbrance. But I conclude from the manner of stating the questions, and so I shall assume the fact to be, that the testator was not seised of the moiety so recovered when he made the conveyance, and had no right to convey it. The last covenant cannot, then, in this case, have any greater operation than the first, and I shall consider the question as if it depended upon the first covenant merely.

At common law, upon a writ of warrantia chartæ, the demandant recovered in compensation only the value for the land at the time of the warranty made, and although the land had become of increased value afterwards, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when the warranty was made. Bro. Abr. tit. "Voucher," pl. 69; Id. tit. "Recouver in Value," pl. 59; 22 Vin. 144–146; Id. pl. 1, 2, 9; Up. pl. 1, 2, 3; 1 Reeves' Eng. Law, 448. This recompense in value, on excambium, as it was anciently termed, consisted of lands of the warrantor, or which his heir inherited from him, of equal value with the land from which the feoffee was evicted. Glanville, 1, 3, c. 4; Bracton, 384, a, b. That this was the ancient and uniform rule of the English law, is a point, as I apprehend, not to be questioned; yet, in the early ages of the feudal law on the continent, as it appears (Feudorum, lib. 2, tit. 25), the lord was bound to recompense his vassal on eviction, with other lands equal to the value of the feud at the time of eviction; "feudum restituat ejusdem æstimationis quod erat tempore rei judicatæ." But there is no evidence that this rule ever prevailed in England; nor do I find, in any case, that the law has been altered since the introduction of personal covenants, to the disuse of the ancient warranty. These covenants have been deemed preferable, because they secure a more easy, certain, and effectual recovery. But the change in the remedy did not affect the established measure of compensation, nor are we at liberty now to substitute a new rule of damages from mere speculative reasoning, and that, too, of doubtful solidity. In warranties upon the sale of chattels the law is the same as upon the sale of lands, and the buyer recovers back only the original price. Fielder v. Starkin, 1 H. Black. 17. This is also the rule in Scotland, as to chattels. 1 Ersk. 206. Our law preserves, in all its branches, symmetry and harmony

[50] This statement is abridged from that of the official report.

[51] Part of the opinion is omitted.

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upon this subject. In the modern case of Flureau v. Thornhill, 2 Black. Rep. 1078, the Court of King's Bench laid down this doctrine, that upon a contract for a purchase of land, if the title prove bad, and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money, with interest and costs was all that was to be expected.

Upon the sale of lands the purchaser usually examines the titles for himself, and in case of good faith between the parties (and of such cases only I now speak) the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive, to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin. The hardship of this doctrine has been ably exposed by Lord Kaines in his examination of a decision in the Scotch law, that the vendor was bound to pay according to the increased value of the land. 1 Kaines' Eq. 284–303; 1 Ersk. 206.

If the question was now res integra, and we are in search of a fit rule for the occasion, I know of none less exceptionable than the one already established. By the civil law the seller was bound to restore the value of the subject at the time of eviction, but if the thing had been from any cause sunk below its original price, the seller was entitled to avail himself of this and pay no more than the thing was then worth; for the Roman law, with its usual and admirable equity, made the rule equal and impartial in its operation. It did not force the seller to bear the risk of the rise of the commodity without also taking his chance of its fall. Dig. lib. 21, tit. 2, l. 78; Id. l. 66, § 3; Id. l. 64, § 1. So far the rule in that law appeared at least clear and consistent but, with respect to beneficial improvements made by the purchaser, the decisions in the Code and Pandects are jarring and inconsistent with each other, and betray evident perplexity on this difficult question. Dig. lib. 19, tit. 1, 45, § 1; Cod. lib. tit. 45, l. q., and Perezius thereon. The more just opinion seems to be, that the claimant himself, and not the seller, ought to pay for them, for nemo debet locupletari aliena jactura, and this rule has, according to Lord Hardwicke, been several times adopted and applied by the English Court of Chancery. East In. Com. v. Vincent, 2 Atk. 38. While on this question, I hope it may not be deemed altogether impertinent to observe, that in the late digest of the Hindu law, compiled under the auspices of Sir William Jones, the question before us is stated and solved with a precision at least equal to that in the Roman code, and it is in exact conformity with the English law. On a sale declared void by the judge for want of ownership the seller is to pay the price to the buyer, and what price? asks the Hindu commentator. Is it the price actually re-

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ceived, or the present value of the thing? The answer is, the price for which it was sold; the price agreed on at the time of the sale, and received by the seller, and this price shall be recovered, although the value may have been diminished. 1 Colebrook's Digest, 478, 479. Before I conclude this head, I ought to observe, that in the present case it does not appear that any beneficial improvements have been made upon the premises since the purchase by the plaintiff, and although some of my observations have been more general than the precise facts in the case required, yet the opinion of the court is not intended to be given, or to reach beyond the case before us. * * *

LIVINGSTON, J.[52] To find a proper rule of damage in a case like this is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a bona fide vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might arise, by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee. The safest general rule in all actions on contract, is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits, which the plaintiff has failed to make unless it shall clearly appear, from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages, when no fraud had been practiced, Justinian directed that the thing, which was the object of contract, should never be valued at more than double its cost. This rule a writer on civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place; but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum, on which he may reasonably have calculated, being founded in natural law and equity, ought in his opinion

[52] Part of this opinion is omitted.

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to be followed, and care taken that damages in the cases be not excessive. Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury, as to which may, or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned by the other. I speak now of a case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extensive causes. What may be a proper course, when dwelling houses or other buildings, and improvements have been erected, we are not now determining. Why should a purchaser of land recover more than he has paid, any more than the vendee of a house or a ship? If these articles rise in value, the vendors would hardly, if there be no fraud, be liable to damages beyond the prices they had received with interest and costs, unless the plaintiffs could show some further actual injury which they had sustained in consequence of the bargain. The English books afford but little light on this point, although it is understood to be the rule in Great Britain to give only the consideration of the deed. The only thing to be found anyways relating to the subject, is in the Year Books in Hilary Term, 6 Edw. II, part 1, 187. It is there said, that in a writ of dower after the land had been improved by the feofee, they shall be extended or set off to the widow, according to the value at the time of alienation, and the reason assigned by Hargrave in his notes on Coke on Littleton, which is not, however, found in the Year Books, is, "that the heir not being bound to warrant, except according to the value of the land at the time of the feoffment, it is unreasonable the widow should recover more of the feoffee than he could, in case of eviction, of the feoffor." In Connecticut, on the contrary, damages are ascertained by the value at the time of eviction, because of land's increasing worth, which is the very reason, perhaps, it should be otherwise. And although the English practice be adverted to by the court in giving its opinion, it is supposed to be founded on the permanent value of their lands; but when we recollect that this has been the rule in Great Britain, at least from the commencement of the fourteenth century, since which time lands have greatly advanced in price, we must attribute its origin to some other cause; probably to its intrinsic justice and merit. Even in Connecticut, the rule applies only to actions on covenant of warranty, and probably not to those on covenant of seisin, because, in the latter case, it is supposed the party may immediately acquaint himself with the strength of his title, and bring his action as soon as he discovers it is defective. This reason is not very satisfactory, for with all his diligence a long time may elapse before his title is called in question, or doubts or suspicions raised about its validity.

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Without saying, then, what ought to be the rule, where the estate has been improved after purchase, my opinion is, that where there has been no fraud, and none is alleged here, the party evicted can recover only the sum paid, with interest from the time of payment, where, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title. The plaintiff must also be reimbursed the costs sustained by the action of ejectment. It was his duty to defend the property, and the costs to which he has been exposed being an actual, not an imaginary loss, arising from the defendant's want of title, he ought to be made whole. In costs are included reasonable fees of counsel, as well as those which are taxable. If a grantee be desirious of receiving the value of land at the time of eviction, he may, by apt covenants in the deed if a grantor will consent, secure such benefit to himself. * * *

PITCHER v. LIVINGSTON.

(Supreme Court of New York, 1809. 4 Johns. 1, 4 Am. Dec. 229.)

VAN NESS, J.[53] * * * The plaintiff has been evicted, in consequence of a total failure of the title derived to him under the deed from the defendant. This fact being assumed, there is no difference between the present case and that of Staats v. Ten Eyck's Ex'rs, 3 Caines, 111, 2 Am. Dec. 254, except, that, in this case, beneficial improvements have been made by the plaintiff upon the property, the value of which he contends he is entitled to recover. * * *

In Staats v. Ten Eyck's Ex'rs, the court determined that the plaintiff was not entitled to recover any damages on account of any increased value of the land. Here a distinction is attempted to be made between an appreciation of the land itself, and that appreciation of it which is produced by the erection of buildings, or the labour bestowed upon it in clearing and cultivating: a very nice, and, as I apprehend, a speculative distinction, to which it would be difficult, if not, in most cases, impossible, to give any practical effect, without danger of the most flagrant injustice. * * *

One, and perhaps the principal reason, why the increased value of the land itself cannot be recovered, is because the covenant cannot be construed to extend to any thing beyond the subject-matter of it, that is, the land, and not to the increased value of it, subsequently arising from causes not existing when the covenant was entered into. For the same reason, the covenantor ought not to recover for the improvements; for these are no more the subject-matter of the contract between the parties, than the increased value of the land. The doctrine contended for by the plaintiff's counsel, is, that the damages sustained by the covenantee at the time of the eviction, ought to be the

[53] Part of the opinion is omitted.

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measure of compensation. Most clearly, then, the increased value of the land is as much within the reason of this rule, as the improvements; and upon the same principle that the covenantee is entitled to the one, he is to the other. * * *

Let us then examine whether, consistently with certain fixed legal principles, the covenantee can recover a greater sum of damages in any case under the covenant for quiet enjoyment, than under the covenant of seisin?

An eviction must be shown before a suit can be maintained on the former covenant. Not so, however, as to the latter; for that is broken, if the grantor has no title, the moment the deed is delivered; and the grantee has an immediate right of action. Whenever the eviction is occasioned by a total want of title in the grantor, then both the covenants of seisin and for quiet enjoyment, are equally broken; and the grantee has his remedy on both. If he proceeds upon the first, he shall recover the consideration expressed in the deed, and the interest. But if he proceeds upon the last, it is said he shall recover according to the value at the time of eviction; and, as I have before remarked, he must be content to recover according to the then value, even though it amounts to one half only of the consideration expressed in the deed.

The case would then stand thus: When the deed contains both these covenants, if the property at the time of eviction be worth one half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seisin, recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seisin, and resort to the covenant for quiet enjoyment; and thus recover the whole amount. Can this be possible? It appears to me, that to give such an effect to these covenants, is not reconcilable with any principle of law or justice.

My understanding of the nature of these covenants, when both are contained in the same deed, is this: That the covenant of seisin, which relates to the title, is the principal and superior covenant, to which the covenant for quiet enjoyment, which goes to the possession, is inferior and subordinate. And I am not aware that a case can possibly occur, where the grantor can recover a greater amount in damages for the breach of the latter than of the former; though there are many cases where he may recover less. The suit here is brought upon both covenants; and both, in consequence of the total failure of the defendant's title and the eviction, have been broken. The plaintiff, accordingly, has a right to recover on both; but as the amount of the recovery would, according to my ideas, be the same on each, he must elect on which of them he means to rely, and take nominal damages on the other. The plaintiff is entitled to but one satisfaction, and he has his remedy on either of the covenants, at his election, to obtain it. It will hardly be said, that he can have judgment for the same sum on both the covenants.

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The covenant against incumbrances stands upon a different footing, and is governed by different principles. That is strictly a covenant of indemnity; and the grantee may recover to the full extent of any incumbrances upon the land, which he shall have been compelled to discharge. But even there it will be found, that the same rule prevails, in fixing the amount of damages, as in actions upon the covenants of seisin and for quiet enjoyment: that is, the party recovers what he has paid, with the interest, and no more. * * *

The covenant for quiet enjoyment, as I have before remarked, is that upon which compensation for the improvements is to be recovered, if at all. This covenant has a more strict analogy to the ancient covenant of warranty, than any of the other modern covenants. If, then, on the covenant of warranty, the satisfaction recovered in land was to be equivalent to the value of the lands granted, as it existed at the time when the covenant was made, I do conceive, that we are bound to adopt a correspondent rule, when satisfaction is sought to be recovered in money, in a personal action, on the covenant for quiet enjoyment.

Such a rule, moreover, I consider to be conformable to the intention of the parties. I question if one grantor out of ten thousand enters into these covenants with the remotest belief that he is exposing himself and his posterity to the ruinous consequences which would result from the doctrine contended for by the counsel for the plaintiff. By giving this doctrine our sanction, we should, in my apprehension, create a most unexpected and oppressive responsibility, never contemplated by the parties, and inflict an equally unmerited punishment upon grantors acting with good faith, and having a perfect confidence in the validity of their title to the land, which they have transferred for what it is reasonably worth.

If any imposition is practiced by the grantor, by the fraudulent suppression of truth, or suggestion of falsehood, in relation to his title, the grantee may have an action on the case, in the nature of a writ of deceit; and in such action he would recover to the full extent of his loss. Har. & But. Notes to Co. Litt. 348a, tit. "Warranty"; 1 Fonb. Eq. 366; 1 Com. Dig. 236, A, 8. * * *

My opinion, therefore, is, that, in this case, the plaintiff is entitled to recover the consideration money expressed in the deed, with the interest, and the costs of suit following the eviction, and no more.[54]

[54] The concurring opinions of Kent, C. J., and Spencer, J., are omitted. Thompson and Yates, JJ., concurred.

See, further, accord: Brandt v. Foster, 5 Iowa, 287 (1857); King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269 (1863); Hertzog v. Hertzog's Adm'r, 34 Pa. 418 (1859). See, contra, Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347 (1840).

Parsons, C. J., in Gore v. Brazier, 3 Mass. 523, 3 Am. Dec. 182 (1807), said: "By the ancient common law the remedy on a warranty was by voucher or warrantia chartæ, and the recompense was other lands to the value at the time the warranty was made; but, when the warrantor, on being vouched, entered into the warranty generally, he was bound to enter other lands to the value of the lands lost at the time he entered into the warranty. * * * A

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BROOKS v. BLACK.

(Supreme Court of Mississippi, 1890. 68 Miss. 161, 8 South. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259.)

Brooks conveyed the land to Spencer, the consideration being $6.296. Black became a purchaser at a sale, under a power contained in a deed of trust executed by Spencer, for $1,000. He conveyed a one-half interest in the land to Mrs. Spencer. They were subsequently ejected under a paramount title, and he now seeks to recover from Brooks one-fourth the consideration paid by Spencer, with costs and attorney's fees expended in defending the ejectment suit, of which action Brooks had not been notified.

COOPER, J.[55] * * * Among the first cases in which the liability of a vendor to his vendee for breach of the warranty for quiet possession was considered were Staats v. Ten Eyck, 3 Caines (N. Y.) 112, 2 Am. Dec. 254, and Pitcher v. Livingston, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229. It was contended for the plaintiffs in these cases that the covenant was one of indemnity, and therefore that the measure of damages should be the value of the land at the time of the breach. * * *

The argument for the plaintiffs was rested upon the rule of damages in breaches of personal covenants in other instances, but the court rejected the contention, and adopted, by analogy, the measure of damages applied in the common-law action of warrantia chartæ, and in suits for the breach of the covenant of seisin, viz., the value of the land determinable by the price paid the vendor; and, since the vendee was liable to the real owner for mesne profits, he was also entitled to interest on the purchase money for the time for which such mesne profits might be recovered against him. The measure of damages established in these cases has been so generally adopted in other states as to have become almost universal, and it would be superfluous to cite authorities in its support. * * *

Another proposition may be confidently stated as supported by an equally uniform current of authority, that the covenant for quiet enjoyment runs with the land, and passes to all subsequent owners claiming in the chain of title. The purchaser of land gets, by operation of law, not only the land, but also the covenant of the first vendor, and that as well where the covenant is by its words to the vendee only, as where it is with him and his assigns. When we come however to the precise question now presented, which is whether a remote vendee may recover from the remote vendor the purchase money paid by the first vendee, or is limited to the amount paid by himself to

personal action of covenant broken was early adopted [instead] by our ancestors; and the general practice has been to give a sum of money equal to the value of the land at the time of the eviction, which was a breach of the covenant. * * * The plaintiff in this action ought to recover the value of the estate at the time of the eviction."

[55] Part of the opinion is omitted, and the statement of facts is rewritten.

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his vendee, we find direct conflict in the decisions, and so far as we have found the cases, they are nearly equal in number on each side. * * *

When it is conceded that, by his covenant, a vendor binds himself to return the purchase price he receives in the contingency of a failure of the title conveyed, and that this obligation is assigned, by operation of law, to whoever may succeed to the title, it would seem to follow, as a corollary, that the recovery by whomsoever had, ought to be equal to the obligation. * * *

It is quite generally held that, by the covenant for quiet enjoyment, the grantor binds himself to pay, in event of failure of title, the then value of the land, which value is determined by the price paid. Appreciation by natural causes, or by improvements put upon the property by the vendee, does not enlarge his liability; nor is it decreased by depreciation in value from any cause. By legal intendment the obligation is as though the covenantor should say to the covenantee: "You, or the person succeeding to the title I convey, shall hold the land, or if you cannot, by reason of title in another, the money I have received shall be restored in lieu of the land." We are unable to perceive any principle upon which this obligation shall be diminished because of the price, in consideration of which it may be assigned. We therefore conclude that the obligation of the covenantor is the same to the assignee that it was to the covenantee, and, being such, is governed by the same measure of damages. * * *

PHILLIPS v. REICHERT.

(Supreme Court of Indiana, 1861. 17 Ind. 120, 79 Am. Dec. 463.)

Graddy sold a lot for $600, of which amount the defendant paid $450 cash and $150 in the form of a note, which was indorsed to plaintiffs, and on which this action was brought. The defendant pleaded an eviction from a part of the lot by the holder of the paramount title, and that such portion was of peculiar value to him, as being fitted for the purposes of a beer cellar, his business being that of a brewer; that Graddy was aware of the purpose of defendant, in making the purchase, to so utilize such portion of the lot; and that the lot was worth $200 less to the defendant by reason of the eviction. The court found that the relative general value of such portion of the lot, taking the entire purchase price as the value of the entire lot, was $30.

WORDEN, J.[56] * * * We think, in principle, the fact that land was bought for a particular purpose, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants. The purpose for which the land was bought does not enter into the covenants. They bind the covenantor that he is

[56] Part of the opinion is omitted, and the statement of facts is rewritten.

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seised of the land, and that he will warrant and defend the title, or in default thereof, that he will return the purchase money and interest; or, if the title fails in part, that he will return a ratable proportion of the purchase money and interest. The fact that the land was bought for a particular purpose cannot have the effect of increasing the liability thus imposed by the covenants. If the land was sold in good faith, and without fraud, the vendor supposing he had title to the whole, no reason is perceived why he should be held to a greater degree of liability on his covenants than if he had not known the purpose to which the purchaser intended to apply it. * * *

GREENVAULT v. DAVIS.

(Supreme Court of New York, 1843. 4 Hill, 643.)

Davis sold to Price by a warranty deed in which the consideration was expressed as $500, who in turn for $500 conveyed to the plaintiff by a warranty deed. The plaintiff was dispossessed by one Blodgett, who derived title through a foreclosure sale under a mortgage given by Eddy, through whom the defendant derived his title. Judgment for the consideration money expressed in the deed.

BRONSON, J.[57] * * * Was the defendant at liberty to show that the consideration paid for the land by Price was less than the sum expressed in the deed? I think not. That the consideration clause in a deed is, as a general rule, open to explanation by parol proof, has been fully settled in this and most of the other states. The cases on this subject were elaborately reviewed in McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103. But there are exceptions to the general rule, and this case is, I think, among the number. * * *

In Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419, the action was upon the covenant of seisin in a deed which expressed a consideration of $900, and for the purpose of reducing the damages the defendant was allowed to prove that the consideration actually paid was only $100. And in a like action, where the consideration expressed in the deed was only $1,800, the plaintiff was allowed to enhance the damages by proving that the consideration actually paid was $2,800. Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661. This was held, by three judges; Bissell, J., giving no opinion, and Hosmer, C. J., dissenting. There is one view of the question involved in these two cases—and I have met with no other decision to the like effect—which was not noticed by either of the learned courts, but which is, I think, entitled to a good deal of weight. Whatever be the price actually paid for the land, the parties may enter into such stipulations, in relation to the title as they think proper. Covenants may be wholly omitted, or they may be so framed as to entitle the grantee to recover

[57] Part of the opinion is omitted, and the statement of facts is rewritten.

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either more or less than he paid in case he shall be evicted. When the deed contains no covenant but that of seisin or general warranty, the consideration is not inserted as a mere matter of form, nor for the sole purpose of giving effect and operation to the deed; but it is inserted for the further purpose of fixing the amount of damages to which the grantee will be entitled in case he is evicted. Taking the consideration clause and the covenant together, we find the agreement to be that, in case the title fails, the grantor will pay and the grantee receive the particular sum specified in the deed; and the one party cannot be required to pay more, nor the other to receive less, than that sum, without a palpable violation of the contract. At least, such are my present impressions, though my brethren are inclined to a different conclusion. But it is not now necessary to decide the question.

In both of the cases which have been mentioned the question arose between the original parties to the contract. The grantee sued his immediate grantor. But here the defendant's grantee has conveyed to the plaintiff, who has been evicted, and he sues as assignee on a covenant running with the land. And, whatever the rule might be if the question were between the original parties to the deed, the defendant is not at liberty to set up this defense against the plaintiff. The original parties knew, of course, what was the true consideration for the grant; but it is not so with third persons. They have no means of knowing what consideration was paid but from what the parties have said by the conveyance. The defendant covenanted with Price and his assigns. When he inserted the consideration and covenant in the deed, he virtually said to any one who might afterwards come in as assignee that he had received the whole $500, and would stand bound to that extent that the title should not fail. The plaintiff acted upon that assurance, and parted with his money, and the defendant should not now be heard to gainsay the admission. It is against good conscience and honest dealing to set up this defense, and the defendant is estopped from doing it. Welland Canal v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51; Dezell v. Odell, 3 Hill, 221, 38 Am. Dec. 628. * * *

Many titles have been received upon the strength of covenants running with the land, and, whatever may be the rule as between the immediate parties to the deed, it would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land when the title has failed in the hands of an assignee. * * *

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RICHARDS v. IOWA HOMESTEAD CO.

(Supreme Court of Iowa, 1876. 44 Iowa, 304, 24 Am. Rep. 745.)

BECK, J.[58] * * * The several deeds upon which the actions are respectively founded are in the form of conveyances commonly used in this state. The only covenant therein binds the grantor "to warrant and defend the title against all persons whomsoever," which implies all the usual covenants in deeds of conveyance in fee simple. Van Wagner v. Van Nostrand, 19 Iowa, 422. * * *

In each case the court instructed the jury that under the evidence the plaintiff was entitled to recover the consideration actually paid by him to the defendant for the land, with interest. Upon the trials defendant offered to introduce evidence showing the sums paid by the plaintiff in each case to acquire the paramount title to the land. it being shown that each plaintiff had acquired such title. The evidence was excluded. * * *

One holding lands under a deed of warranty may, at his peril, acquire a paramount title in defense of his possession, and in a proper action recover of the grantor in such deed upon his covenants therein. Thomas v. Stickle, 32 Iowa, 71. The right of recovery in such a case is limited to the amount of damage actually sustained by the grantee, which the authorities hold is the sum paid for the paramount title, not exceeding the consideration of the deed upon which the action is brought. * * *

Plaintiffs' counsel claim that the rule is only applicable to the case where the title to a part of the land covered by the deed failed, or when, for some other reason, the covenant of seisin is not wholly broken. But if there be a total failure of title, and a total breach of the covenant, the measure of damages, though the grantee has bought in the paramount title, is the consideration paid for the land, with interest.

The answer to this position may be brief. As we have seen, the grantee may protect his possession by the purchase of the paramount title, and this is constructive eviction, which will enable him to recover upon the covenant of the deed. Thomas v. Stickle, supra; Rawle, Cov. 281. The law will render him compensation in damages for the loss he has sustained by eviction. It will give him nothing more than compensation. That loss is the sum he paid for the paramount title. To the extent of the consideration paid for the land, which is the limit of the grantor's liability on his covenant, he may recover his loss in a proper action. * * *[59] Reversed.

[58] Part of the opinion is omitted.

[59] See, also, McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456 (1870).

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(C) Breach of Covenants against Incumbrances.

HARRINGTON v. MURPHY.

(Supreme Judicial Court of Massachusetts, 1872. 109 Mass. 299.)

Contract, for breach of the defendant's covenant of warranty against incumbrances.

MORTON, J.[60] It appears from the report, that the only incumbrance which the plaintiff proved was the existence of an inchoate right of dower in a part of the estate conveyed by the deed. It was decided by this court, after full consideration, in Shearer v. Ranger, 22 Pick. 447, that an inchoate right of dower is an existing incumbrance amounting to a breach of a covenant against incumbrances; and that decision was approved in the recent case of Bigelow v. Hubbard, 97 Mass. 195. It follows that the plaintiff is entitled to maintain this action.

But we are of opinion that the ruling of the presiding judge, directing a verdict for the plaintiff for fifty dollars, was erroneous. The plaintiff offered no evidence of damage, except that he had paid an auctioneer fifty dollars for selling the estate at auction, and that the purchaser refused to complete the purchase upon discovering this incumbrance. Such an expense to the covenantee is not the immediate consequence of the breach of the covenant. It is too remote and indirect to be an element of damages.

The covenant was broken as soon as the deed was delivered to the plaintiff, and an action then accrued to him for such breach. Clark v. Swift, 3 Metc. 390. The general rule of damages is, that, if the covenantee has extinguished the incumbrance, he may recover the reasonable expenses incurred in doing so; if he lies by without doing so, and has not been disturbed in the enjoyment of the estate conveyed, he can recover only nominal damages. If he cannot remove the incumbrance, the measure of damages is a just compensation for the direct injury resulting from it. Chapel v. Bull, 17 Mass. 213; Harlow v. Thomas, 15 Pick. 66; Batchelder v. Sturgis, 3 Cush. 201; Wetherbee v. Bennett, 2 Allen, 428. In the case at bar, the plaintiff has not been disturbed in the enjoyment of the estate, and has not paid anything to extinguish the incumbrance. Upon this state of the evidence, it was erroneous to instruct the jury that he was entitled to recover the sum of fifty dollars. * * *

MITCHELL et al. v. STANLEY et al.

(Supreme Court of Errors of Connecticut, 1877. 44 Conn. 312.)

The plaintiffs purchased of the defendants an undivided two-thirds of a tract of land for $5,000, the deed containing the usual covenants

[60] Part of the opinion is omitted.

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of warranty and seisin and against incumbrances. A prior owner had granted an easement of passage along such tract to the owners of a canal abutting thereon. It was found as a fact that the land was worth actually $750 less than it would have been if it had been free from incumbrances. However, the right of passage had been exercised only a few times. The court entered judgment for but $10.

GRANGER, J.[61] * * * We think the plaintiffs are entitled to recover the larger sum. The case finds that they paid full value for the land, and that by reason of the incumbrance the land was worth $750 less than it would have been without it. They therefore have sustained a loss of $750, and the defendants are bound by their covenant to make good this loss, it being the actual damage the plaintiffs have sustained by reason of the breach of covenant. It is laid down as law in many of the cases cited in the defendants' brief, that the plaintiff in cases of this sort is entitled to recover actual damage, and the defendants insist that the $10 is the only actual damage that the plaintiffs have sustained. It is true that this is the only direct damage they have received from the exercise of the right of way. But is this the only actual damage? We think not. The incumbrance is permanent and perpetual and the estate of the plaintiffs forever burdened with this servitude, which they have no power, as a matter of right, to remove, and which diminishes the value of their land to the amount of $750. The true rule of damage we think is well stated in 2 Washburn on Real Property (2d Ed.) 730, as follows: "If the incumbrance be of a permanent character, such as a right of way, or other easement which impairs the value of the premises, and cannot be removed by the purchaser as a matter of right, the damages will be measured by the diminished value of the premises thereby occasioned." This rule is sustained by cases cited in the plaintiffs' brief. Wetherbee v. Bennett, 2 Allen (Mass.) 428; Woodbury v. Luddy, 14 Allen (Mass.) 6, 92 Am. Dec. 731; Harlow v. Thomas, 15 Pick. (Mass.) 69; Rawle on Covenants, 291; Sedgwick on Damages (6th Ed.) 199; Hubbard v. Norton, 10 Conn. 435. We think that the above rule is clearly applicable to this case, and is decisive of it. There can be no doubt that $750 is the actual damage sustained by the plaintiffs, as much so as if there had been a breach of the covenant of seisin, and the quantity of land described in the deed had fallen short to the amount of $750. No one would question but that the defendants would be bound in that case to pay that amount. Again, if the incumbrance had been a mortgage and the plaintiffs had been obliged to pay $750 to remove it, there can be no doubt that this sum would be the measure of damage. We can see no difference in the result to a plaintiff, whether this loss is occasioned by failure of title to a portion of the land, or by his having to pay more money to remove a mortgage, or by his property being rendered less valuable by reason of the incumbrance. * * *

[61] Part of the opinion is omitted, and the statement of facts is rewritten.

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CLARK v. ZEIGLER.

(Supreme Court of Alabama, 1885. 79 Ala. 346.)

SOMERVILLE, J.[62] The question for decision is as to the correct rule for the measure of damages in an action on a covenant of warranty, when only a certain portion of the land covered by the warranty is subject to incumbrance. In October, 1883, the defendant, Clark, conveyed to the plaintiff, Zeigler, three hundred and twenty acres of land, with warranty of title. At the time of this conveyance, forty acres of the tract were subject to an incumbrance which defendant had created, several years previous, in favor of Wadsworth, by conveying to him the right to enter and cut all of the "saw timber" on this particular forty acres. Under this license, Wadsworth entered, and cut over three hundred trees, while the plaintiff was in possession, and against his objection.

If there had been a failure of title to the whole tract of three hundred and twenty acres, resulting in an eviction of the vendee, who is here the plaintiff, the measure of damages, in an action based on the broken covenant of warranty, would be the purchase money, or original consideration, with interest and the costs of the ejectment suit added. Kingsbury v. Milner, 69 Ala. 502. Our decisions, like those of many of the other states, have made no distinction between covenants of seisin, or of title, and covenants of warranty—the rule in each being the same. Bibb v. Freeman, 59 Ala. 612. In some states, the measure of damages has been held to be the value of the land at the time of the conveyance, with interest, whether this sum be either more or less than the actual purchase money; and in others, the full value at the time of eviction, whatever may have been its appreciation or depreciation. The weight of authority is conceived to be favorable to the rule adopted in our more recent decisions, limiting, in ordinary cases, the right of recovery to the purchase money, with interest and the costs of suit. 2 Greenl. Ev. § 264; 2 Parsons, Contr. 225, note (n). The justice of this rule seems to consist in the protection afforded the covenantor against any rapid increase in value of the lands, by reason of the discovery of mineral wealth, or from other accidental causes, and the loss he might sustain, amounting in many instances to absolute ruin, by the erection of expensive improvements by the vendee on the purchased premises. Its injustice consists in the fact, that it fails frequently to indemnify the covenantee against the actual damages which he has sustained by the breach of covenant, and following as the apparent natural and proximate consequence.

For the latter reason, the courts have seen fit to limit the principle, so as to make it applicable only to real estate, and not to the sale of chattels. In some instances, and with much reason, cases have been excepted from its operation, where the vendor has acted with fraud,

[62] Part of the opinion is omitted.

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or in bad faith, or even knew that he had no title at the time of his sale, or agreement to sell; a distinction being made between his inability to make a good title, and his sheer refusal. 2 Add. Contr. (Morgan's Ed.) § 529; 3 Parsons, Contr. 230; Pinkston v. Huie, 9 Ala. 252. In Snodgrass v. Reynolds, decided at the present term [79 Ala. 452, 58 Am. Rep. 601], we declined to apply this general rule, in an action by a lessee against a lessor for breach of covenant to put the plaintiff in possession, the measure of recovery in such case being held to be the value of the lease or term.

Here, however, there is no failure of title to the whole tract, which was the subject of sale, and no eviction of the vendee as to any portion of it. There is only a partial defect of title as to forty acres, or about one-eighth fractional part of the whole. It is well settled, where there is an entire failure of title as to any fractional part of a tract sold, the recovery for this defect will be in proportion to the *value* of this part, and not to its mere area or quantity. As said by Chancellor Kent, in Morris v. Phelps, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323, "the law will apportion the damages to the measure of value between the land lost and the land preserved." In ascertaining such proportion, it was held in Bibb v. Freeman, 59 Ala. 612, 619, that the whole tract should be rated at its cost value—the original purchase money. The calculation would be an easy one of arithmetical proportion. The damages for an entire failure of title to forty acres, of a tract of three hundred and twenty acres, for example, would be an amount which would bear the same arithmetical proportion towards the purchase money, as the real value of the forty acres would to the real value of the entire tract of three hundred and twenty acres.

The principle is not of easy or convenient application, where there is a mere incumbrance on a part of the land, without failure of title in toto as to such part. The purpose of all damages, not exemplary or punitive, is compensation, or recompense, for the injury actually suffered by the plaintiff. The damage here suffered, and for which a recovery should be allowed, is the diminished value of the whole tract of land, the title of which the defendant warranted, by reason of the incumbrance; or, in other words, the difference between the value of the whole tract, if the title were good, and its value as depreciated by the incumbrance. This rule had been recognized as far back as Gray v. Briscoe, Noy, 142, where a copyhold estate had been sold as a freehold, with a covenant that the vendor was seized in fee. The measure of damages, on suit by the covenantee, was held to be the difference between the value of a freehold and a copyhold estate. So, in Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335, where land was incumbered by a perpetual obligation, in the nature of an easement, by which the owner was always to maintain a fence adjacent to a railroad running through his farm, the proper measure of damages for breach of covenant against incumbrances was held to be a just compensation for the real injury resulting from such incumbrance, esti-

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mated by the difference in the fair market value of the estate by reason of the existence of such defect of title. A sufficient protection is afforded the vendor, by restricting the amount of damages allowed to be recovered to the entire purchase money, with interest. We readily perceive, that a strong argument can be made in favor of the view, that the recovery ought to be limited to the amount which would have been recovered, if the entire title of the incumbered portion had failed; for it would seem, in this case, that the plaintiff ought not to recover more damages for the sale by the defendant of the timber on the forty acres, than he would for the sale of the fee-simple interest in it. So, on the other hand, it could be urged with equal force, that the damage would be the same, ordinarily, whether the trees were cut from a part of the land, or miscellaneously from all parts, provided the number and kind of trees cut were in each case the same. Making choice between two difficulties, we prefer to adopt the simpler and more convenient rule, which, as we have said, is to compensate the plaintiff for the estimated diminution in value of his entire tract of land, by reason of the incumbrance, from the time of the breach of covenant, with interest and costs of suit, not, however, to exceed the purchase money paid for the whole tract, with interest. If the grantee had paid off, or rather purchased in this incumbrance, he would have been entitled to recover of the grantor what he had reasonably expended in thus discharging it, at least to an amount not exceeding the purchase or consideration money and interest. 3 Parsons, Contr. 228, note (u); 4 Kent's Com. 476; Dimmick v. Lockwood, 10 Wend. (N. Y.) 142. And this sum would seem to be a close approximation, if not a just measure of the diminished value of the premises, because it was the cost of making the title what it would have been had there been no incumbrance. * * *[63]

II. VENDEE'S FAILURE TO TAKE TITLE.

LAIRD v. PIM.

(Court of Exchequer, 1841. 7 Mees. & W. 474.)

Action in assumpsit by a vendor against a vendee, who had been let into possession under a contract to purchase, but who did not complete the same. The plaintiff sought to recover the entire purchase price of £4,125. Rolfe, B., allowed the plaintiff to recover only £750. as damages for the breach of the contract by the defendant. Rule to show cause why the damages should not be increased to £4,125.*

PARKE, B. The measure of damages, in an action of this nature, is

[63] See, also, Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281 (1811); Guthrie v. Russell, 46 Iowa, 269, 26 Am. Rep. 135 (1877).

*The statement of facts is rewritten.

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the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money, in consequence of the nonperformance of the contract? It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again. The direction of my Brother Rolfe, therefore, was quite correct.

Rule refused.

McGUINNESS v. WHALEN.

(Supreme Court of Rhode Island, 1889. 16 R. I. 558, 18 Atl. 158, 27 Am. St. Rep. 763.)

Action of assumpsit, pending on demurrer to the declaration. The defendant bid $3,100 at an administrator's sale for a parcel of realty, paying down $150, but had failed to pay the balance. The administrator subsequently put the tract up again at auction, and sold the same for the highest bid, $2,150. The costs of such second sale were $40.17. The declaration demanded judgment for $990.17.

DURFEE, J.[64] * * * The contract which the defendant entered into when he made his bid was a contract to pay the price bid by him for the premises upon receiving a deed thereof, and, if on tender of the deed he refused to complete the payment, he committed a breach of said contract, and laid himself liable to an action upon it for damages. In such action the measure of damage is the loss to the vendor from the default of the vendee, and it may be that the jury, upon proof of the second sale, would find the damages to be the difference between the two bids and the expense of the second sale; but the question would be purely one of damages, and they would not be shut up to that amount. McCombs v. McKennan, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505. In order to make the vendee liable in assumpsit for such difference and expense, in case of his default, it should be made a condition of the sale that in such case the property should be resold, and the vendee held to pay such difference and expense. * * *

The plaintiff contends that the mode of declaring here used is proper, because the sale was judicial, and in such sales the defaulting vendee is liable for the deficiency on resale, whether the terms of sale so provide or not. An administrator's sale, however, under our statutes, is not a judicial sale, as was decided by Judge Story in Smith v. Arnold, 5 Mason, 414, 420, Fed. Cas. No. 13,004. * * *

Demurrer sustained.[65]

[64] Part of the opinion is omitted, and the statement of facts is rewritten.

[65] Accord, illustrating the American rule: Old Colony Ry. Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394 (1856); Hogan v. Kyle, 7 Wash. 595, 35

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SECTION 4.—LOAN, INDEMNITY, AND INSURANCE CONTRACTS.

BETHEL v. SALEM IMPROVEMENT CO.

(Supreme Court of Appeals of Virginia, 1896. 93 Va. 354, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808.)

The defendant company agreed to purchase of plaintiff 1,500,000 bricks, to be burned for it by plaintiff. After plaintiff had manufactured 803,491 bricks the defendant notified the plaintiff that it would not receive any more, and it did not pay for those already manufactured, excepting to a small amount. Plaintiff seeks to recover a profit, which he alleges would have been made, of $3 per thousand on the bricks unburned, and also to recover the balance due on the purchase price of those completed. A verdict for $1,403.04 for plaintiff was set aside by the lower court, and the plaintiff complains thereof. The ground for such action was the giving of an instruction authorizing the recovery of the profits claimed.

KEITH, P.[66] * * * The failure to pay the money is the cause alleged in the instruction, that forced the plaintiffs to stop the manufacture of the bricks, and which entitles the plaintiffs to recover, not only for the bricks manufactured by them according to said contract, but for the profit on the difference between the number of the bricks so manufactured by them, and the 1,500,000 bricks manufactured according to the terms of the contract, to be ascertained by placing the bricks at the price fixed in the contract, and deducting therefrom the cost of the bricks as shown by the evidence. For the breach of con-

Pac. 399, 38 Am. St. Rep. 910 (1894); Allen v. Mohn, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126 (1891).

COVENANTS OF LANDLORD AND TENANT.—For the general measure of damages for failure of the landlord's covenant of quiet enjoyment, see Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858 (1887); Smith v. Wunderlich, 70 Ill. 426 (1873); Allison v. Chandler, ante, p. 249. The rule that only nominal damages are recoverable, under Flureau v. Thornhill, 2 W. Bl. 1078 (1775), in this class of cases, is probably no longer existent. Cohn v. Norton, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572 (1889). For the application of the rules of Hadley v. Baxendale, 9 Exch. 341 (1854), and of "certainty" to cases between landlord and tenant, see Hodges v. Fries, 34 Fla. 63, 15 South. 682 (1894); Hall v. Horton, 79 Iowa, 352, 44 N. W. 569 (1890), Bostwick v. Losey, 67 Mich. 554, 35 N. W. 246 (1887), and U. S. T. Co. v. O'Brien, 143 N. Y. 284, 38 N. E. 266 (1894). The rule of avoidable consequences is applicable. Fisher v. Goebel, 40 Mo. 475 (1867); Myers v. Burns, 35 N. Y. 269 (1866); Cook v. Soule, 56 N. Y. 420 (1874). For the measure of damages in case a tenant fails to perform his covenants, see Massie v. State National Bank of Vernon, 11 Tex. Civ. App. 280, 32 S. W. 797 (1881), and Watriss v. First N. Bank of Cambridge, 130 Mass. 343 (1881).

[66] Part of the opinion is omitted, and the statement of facts is rewritten.

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tract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only. Wood's Mayne, Dam. (1st Am. Ed.) p. 15. * * *

This is the ordinary case of a failure to comply with a contract to pay money at a stipulated time. In such cases the measure of damages for the breach of the contract is the principal sum due, and legal interest thereon. To make a defendant responsible for the profits which might have accrued to the plaintiff by the use of the money in addition to the interest would be harsh and oppressive, and should not be sanctioned by the court, unless the plaintiff can bring his case within some well-recognized exception to the rule. * * *[67]

LOWE v. TURPIE et al.

(Supreme Court of Indiana, 1896. 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.)

Lowe contracted to pay certain debts, liens, and incumbrances on property held by him as security and belonging to the Turpies, but afterward refused to do so. The realty was subsequently sold to pay these obligations, and the Turpies sue for damages by reason thereof. They were aware of Lowe's refusal to perform prior to the time of the bringing of the suits to enforce the incumbrances.

MONKS, J.[68] * * * It is clear, we think, that the measure of damages for the breach by appellant of his agreement to advance money to pay liens, etc., set forth in the finding, is the same as for breach of a contract to loan money direct. * * * It is the rule, settled beyond controversy, that the damages to be recovered must be the natural and proximate consequences of the breach of the contract. Damages which are remote or speculative cannot be recovered. * * * When one is indebted to another, and fails to pay the same when due, the damages for the delay in payment are provided for in the allowance of interest. This is the measure of damages adopted by the law in all actions by the creditor against his debtor. * * *

Appellees admit the measure of damages for the failure of a debtor to pay money when due to be as stated, but insist that where the obligation to pay money is special, and has reference to other objects than the mere discharge of debts,—as in this case, to advance or loan money to pay taxes and discharge liens,—damages beyond interest for delay of payment, according to the actual injury, may be recovered; citing 1 Suth. Dam. p. 164, § 77, where the rule stated by appellees is approved. The author, however, in the same section, says: "Where one person furnishes money to discharge an incumbrance upon the

[67] A failure to loan money as per contract may justify the giving of substantial damages, if it cannot be obtained elsewhere by the borrower. M. & O. Bank v. Cook, 49 Law Times R. (N. S.) 674 (1883).

[68] Part of the opinion is omitted, and the statement of facts is rewritten.

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land of the person furnishing the money, and the person undertaking to discharge it neglects to do so, and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished, with interest, or the value of the land, according to circumstances. If the landowner has knowledge of the agent's failure in time to redeem the land himself, the damages will be the money furnished, with interest. But if the landowner justly relies upon his agent to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost." See Fontaine v. Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648.

In Blood v. Wilkins, 43 Iowa, 565, Blood was the owner of certain land in Jones county, and conveyed the same to Wilkins as security for money advanced and to be advanced by Wilkins, and applied in payment of certain mortgages and tax liens upon the property. Part of the money was paid out directly by Wilkins in discharge of liens, and a part was retained by him. At the time of the loan the land had been sold for taxes, but the period for redemption had not yet expired. The amount borrowed was enough to discharge all liens, and to redeem from said sales. Wilkins, after the execution of said deed given as security, retained in his hands the money necessary to redeem, under an agreement with Blood that he would redeem. Wilkins failed to redeem, and tax titles accrued against the land, whereby it was lost to Blood, except 40 acres. The court, in speaking of the measure of damages, said: "There only remains to be considered what is the measure of liability. When one person furnishes the money to another to discharge an incumbrance from the land of the person furnishing the money, and the person undertaking to discharge the incumbrance neglects to do it, and the land is lost to the owner by reason of the incumbrance, the measure of damages may be the money furnished, with interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of his agent's failure in time to redeem the land himself, his damages will be the money furnished, with interest. But if the landowner justly relies upon his agent, to whom he has furnished money to discharge the incumbrances, and the land is lost without his knowledge, and solely through the fault of the agent, then the agent will be liable for the value of the land lost." This language was adopted by the author of Sutherland on Damages, in stating the rule. See 1 Suth. Dam. p. 164, § 77. * * *

We think the rule concerning the measure of damages in cases where one person furnishes the money to another to discharge liens on the land of the one furnishing the money is correctly stated in Blood v. Wilkins, supra. In an action for breach of a contract to loan money to pay liens or incumbrances, no more than nominal damages can be recovered unless the facts showing special damages are alleged and proven. Turpie v. Lowe, supra. When the person who

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contracted to make the loan neglects or refuses to do so, and the owner is compelled to procure the money elsewhere, the measure of damages is the difference, if any, between the interest he contracted to pay, and what he was compelled to pay to procure the money; not exceeding, perhaps, the highest rate allowed by law. 2 Sedg. Dam. § 622. It is not necessary to determine whether the measure of damages for breach of a contract to loan money to pay liens in case the land is lost is the same as in a case of the neglect of one to whom money is furnished by the landowner to pay liens or incumbrances, for the reason that, if it were conceded that the measure of damages in this case was the same as it would have been had the Turpies furnished appellant the money to discharge all said debts and incumbrances, yet, under the facts as stated in the special finding, the Turpies would not be entitled to special damages. To entitle any one to recover more than nominal damages for a breach of contract to loan money to pay incumbrances, it is necessary not only to allege and prove the contract to loan the money, and its breach, and that the person who agreed to make the loan knew the purpose for which it was to be used, and the necessity therefor, but also that the land was lost to the owner by reason of such liens or incumbrances, and without his knowledge, and solely through the fault of the person who was to loan the money, or, if the landowner had notice of the neglect or refusal to loan the money, that it was at such a time as to deprive him of the opportunity to procure the money elsewhere, and pay said liens or incumbrances, or redeem the land, if sold. * * *

In contemplation of law, money is always in the market, and procurable at the lawful rate of interest. And if the owner of real estate, who has a contract with another to loan him money to pay liens or incumbrances on his land, who refuses to do so, has knowledge of such refusal in time to give him an opportunity to seek for it elsewhere, the fact that he cannot procure the money, on account of being in embarrassed circumstances, will not entitle him to recover more than nominal damages; for the reason that no party's condition, in respect to the measure of damages, is any worse, for having failed in his engagement to a person whose affairs are embarrassed, than if the same result had occurred with one in prosperous or affluent circumstances. * * *

It follows, therefore, that upon the facts found the Turpies were not entitled to more than nominal damages for the breach by appellant of his contract to loan money to pay liens and incumbrances. * * *

ASHDOWN v. INGAMELLS.

(Court of Appeal, 1880. 5 Exch. Div. 280.)

Allin & Smith, traders, being in embarrassed circumstances, sold their business to the defendant upon the condition that he should pay certain debts owing by them. This he failed to do and left a balance

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of £1,750. unpaid. This action is for breach of the contract and is brought by the trustee in bankruptcy of Allin & Smith. The lower court held that only nominal damages were recoverable.

BRAMWELL, L. J.[69] I think that this judgment must be reversed. With all respect to my Brother Huddleston, I really cannot agree with him. The defendant undertook to the liquidating debtors to pay for them certain debts. It is alleged that he has not done so, and has refused to do so. If this allegation is correct, the contract has been broken. It is not a contract that can be performed at any time. If it is not performed within a reasonable time it is broken, and broken for ever. The defendant cannot now perform it; all that he could do now would be to mitigate damages by making the payment he agreed to make. If the liquidating debtors had not become insolvent, they clearly would have been entitled to recover by way of damages the sum which the defendant ought to have paid, but did not pay. That being the position of the parties, how can it be possible that the trustee in liquidation is not entitled to recover the sum which the defendant omitted to pay? The plaintiff, who is the trustee in liquidation, must have a right to the same amount as the liquidating debtors would have been entitled to, if they had continued solvent and had brought an action for breach of contract.

It is unnecessary to treat of the authorities at length; but I may say that Carr v. Roberts, 5 B. & Ad. 78, cited on behalf of the plaintiff, is in point. That was an action upon a covenant to indemnify. Here the agreement is not merely to indemnify the liquidating debtors but to pay the debts due by them. The distinction however, is immaterial. At first sight Porter v. Vorley, 9 Bing. 93, appears to support the contention for the defendant; but it is clear to me that the Court of Exchequer, in Hill v. Smith, 12 M. & W. 618, p. 631, did not approve of it; and, moreover, the facts in it were very different from those before us. * * *[70]

PORT v. JACKSON.

(Supreme Court of Judicature of New York, 1819. 17 Johns. 239.)

Barlow assigned a lease for 1,690 years to Port, at a yearly rental, who in turn assigned it to the defendant, who agreed to perform all the covenants of the lease. The rent remained unpaid for over 24 years. The plaintiff sued the defendant upon his covenant to pay the rent, who pleaded, inter alia, that he had assigned the lease to one Graham prior to the accruing of any of such unpaid rent, who had en-

[69] Part of the opinion is omitted.

[70] See, also, Greene v. Goddard, 9 Metc. (Mass.) 212 (1845); Watkins v. Morgan, 6 Car. & P. 661 (1834); Cook v. Fowler, L. R. 7 H. L. Cas. 27 (1874); Swamscot Machinery Co. v. Partridge, 25 N. H. 369 (1852). And see cases hereinbefore under title "Interest."

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tered into possession and had been accepted as a tenant. The plaintiff did not allege that he had paid the rent to Barlow or that he had been damnified.

VAN NESS, J.[71] * * * The validity of this plea depends upon the construction to be given to the defendant's covenant contained in the assignment to him by the plaintiff, and the nature and extent of the obligation which that covenant created. It is substantially a covenant, on the part of the defendant, that he will pay to Barlow, the lessor, the rent reserved by the lease, from time to time, as it shall become due. It was made with the plaintiff and he only can maintain an action upon it, in case of nonperformance; it is not a covenant made with Barlow, the lessor, nor for his benefit, nor can it be enforced by him. For, although the defendant, so long as he continued to be the owner of the term under the assignment, was liable for the payment of the rent to the lessor; yet such liability was not created by the covenant in question, but by the covenant in the lease. He was answerable as assignee of the term, not upon any privity of contract, but upon the privity of estate; and he would have been equally liable if no such covenant as that in question was contained in the assignment. * * *

It is argued on the part of the defendant, that, until the plaintiff has paid the rent, he cannot maintain an action at all, or in other words, that the covenant is not broken until the plaintiff has satisfied the rent. This is a mistake. The covenant is, that the defendant shall pay the rent to the lessor as it falls due, and the moment the day of payment is past, and the rent is left unpaid, the covenant is broken, as well according to its words as its spirit, and the action is, at all events, maintainable.

Another question then arises, what shall be recovered? Nominal damages only, or the amount of the rent due? My opinion is, that the latter is recoverable. The covenant is not that the defendant shall indemnify the plaintiff against his own covenant in the lease, or against any damage which he may sustain, but it is express and positive, that the defendant will pay the rent, for which the plaintiff continued to be liable, notwithstanding the assignment; the sum to be paid is certain and liquidated, and the breach of the covenant consists in the nonpayment of it, and a plea of non damnificatus would, therefore, be no answer to the declaration. The contract between the parties amounts to a covenant, on the part of the defendant, to pay a present debt of the plaintiff which would become payable, from time to time, to Barlow, the lessor; and it would be against all reason and justice to permit the defendant to say, that the plaintiff shall himself first pay and advance the money, before his right of action against the defendant to recover it arises. This was not the intent of the parties, nor the legal effect of the contract; and the very reason for inserting this covenant was to guard against the necessity of the plaintiff's pay-

[71] Part of the opinion is omitted, and the statement of facts is rewritten.

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ing the rent, before he would be in a situation to recover it from the defendant, on his default. If the plaintiff had, from time to time, as the rent fell due, paid it to the lessor, he might have recovered it back from the defendant or his assignees, in case he had assigned it, as so much money paid for his or their use; and no such covenant as that contained in the lease was necessary, if the construction of it be such as is contended for on the part of the defendant. The very insertion of this covenant shows, that something more was intended, and that, no doubt, was, that the plaintiff should have his remedy upon it against the defendant, the moment he exposed the plaintiff to a suit by not paying the rent as it fell due. * * *

VALENTINE v. WHEELER.

(Supreme Judicial Court of Massachusetts, 1877. 122 Mass. 566, 23 Am. Rep. 404.)

AMES, J.[72] It has been said in Gilbert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359, that there is no branch of the law in which the decisions of the courts have been more fluctuating than in regard to the rule of damages in suits on contracts in the nature of indemnity. It is intimated in that case that the more just and reasonable rule would be that the damages should be measured by the loss actually sustained; and it is added that such is the tendency of the more modern decisions both in this country and in England. On the other hand, it is well established by numerous decisions, that upon a promise by one person to pay a debt due from another, the latter may maintain an action, after the debt has become due, without having first paid it himself, and may recover the entire amount. Furnas v. Durgin, 119 Mass. 500, 507, 20 Am. Rep. 341, and cases there cited.

If the bond in the present case is to be treated merely as a bond of indemnity against loss by reason of his responsibility upon the drafts of John P. Wheeler & Co., the plaintiff is only to recover the actual amount of the loss. What he had lost would be the measure of his damages. On the other hand, if it is to be taken as a promise that the principal obligor shall specifically pay these drafts at maturity, the measure of damages might be the entire amount of the drafts with interest and costs.

Without undertaking to reconcile the conflicting authorities in cases of this general class, we have come to the conclusion, upon the facts and special circumstances of the present case, that the bond is to be construed as a contract of indemnity merely, and that the plaintiff's damages must be limited to the amount of his actual loss. Little v. Little, 13 Pick. 426; Aberdeen v. Blackmar, 6 Hill (N. Y.) 324; Webb v. Pond, 19 Wend. (N. Y.) 423; Wallis v. Carpenter, 110

[72] Part of the opinion is omitted.

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Mass. 347. The contract, as expressed in the bond, is that the principal obligor "shall well and truly pay, or cause to be paid, all demands, acceptances or indorsements and obligations for which said Valentine is in any wise responsible for or on account of said firm of John P. Wheeler & Co., and shall hold and save the said Valentine harmless and free from loss and inconvenience on account of any debt, claim, demand or liability of the firm of said John P. Wheeler & Co." From the terms of the bond, we must infer that the plaintiff's acceptance of the drafts was for the purpose of lending his credit to that firm. He was simply an accommodation indorser or guarantor; or, to state the proposition more accurately, he stood in the same position as if he had given what is called an accommodation note in order that the payee might use it for his own benefit. If the acceptance of the drafts had represented a genuine and existing debt due from him to the drawers, there would have been no occasion for the drawers to give security to the acceptor for their payment at maturity. The covenant in the bond was not an undertaking, therefore, to pay a debt absolutely due from Valentine, but to protect him against a contingent liability. So far as the parties to the bond were concerned, he was only conditionally liable on the drafts, and was to pay them if the drawer did not. Even if they were not paid at maturity, there might be a state of facts in which Valentine, as an accommodation acceptor, might himself take them up and be relieved of any further liability upon them by the payment of less than their nominal amount. That would depend upon the use which has been made of them by the party accommodated. Stoddard v. Kimball, 6 Cush. 469. The bond provides, not for a debt due from Valentine to another person, but for all demands, acceptances, etc., of the firm, for which Valentine is in any wise responsible. The language of the bond can hardly be otherwise construed than as a recognition of the fact that he was a surety on certain contracts of the firm, and was to be indemnified and protected as such. * * *

The result, therefore, is that the amount of the judgment in the suit upon the drafts, with interest, is not the true measure of the plaintiff's damages, but that they must be limited to the amount of the loss and damage actually sustained, which, as the facts are presented in the bill of exceptions, we understand to be the sum of $500, with interest. * * *[73]

[73] See, also, Wicker v. Hoppock, 6 Wall. 94, 18 L. Ed. 752 (1867); Farnsworth v. Boardman, 131 Mass. 115 (1881); Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341 (1876); Osgood v. Osgood, 39 N. H. 209 (1859).

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ILLINOIS MUT. FIRE INS. CO. v. ANDES INS. CO.

(Supreme Court of Illinois, 1873. 67 Ill. 362, 16 Am. Rep. 620.)

SHELDON, J.[74] The only question here presented for decision is as to the amount of the recovery.

The original insurer became liable to pay to the first assured the sum of $6,000 in consequence of the loss of the subject matter of the first insurance; but it actually paid only $600 in full discharge of the liability. The amount of the reinsurance was $2,000. Shall the reinsured recover the full $2,000, or only $600, or a pro rata part of the latter sum?

So far as we are aware, the contract of insurance, or of reinsurance, against loss by fire, has uniformly been held to be a contract of indemnity not exceeding the sum insured.

In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, not the measure of the assured's claim. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled where it is less than the sum insured. So, if the assured has parted with all his interest in the subject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for an indemnity, and he has sustained no loss or damage.

Although the original insurer here did become liable to pay the sum of $6,000, that did not turn out to be the amount of its actual loss. The actual loss and damage which it sustained was $600, the sum which it paid in full discharge of its liability. That sum, given to the reinsured, would make good the loss sustained by reason of the original insurance; whereas, to allow a recovery of $2,000, would enable it to realize a gain of $1,400 over and above the actual damage it has sustained. It is difficult to see how this can be done consistently with principle, under a contract which, we apprehend, this must be admitted to be, to indemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance. * * *

Notwithstanding, then, the adverse authority that is to be found, we are disposed to hold, on principle, as we regard it, that $600, the sum paid by the reinsured company in discharge of its liability for $6,000, was the actual loss it sustained and the extent of the recovery which should be had. And in view of the following special clause in this policy of reinsurance, we are of the opinion that the recovery in this case should be reduced even below that sum. The clause is this: "Loss, if any, payable pro rata, at the same time and in the same manner as the reinsured company."

The only construction we can well put on this clause and give it practical effect, is this: that the Andes Insurance Company, the rein-

[74] Part of the opinion is omitted.

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surer, was only to pay at the same rate as the Illinois Mutual Fire Insurance Company, the reinsured, should pay; and as the latter company paid only ten cents on the dollar of its insurance, the former company is only liable to pay at the same rate—that is, ten cents on the dollar of the amount of its reinsurance, which would be $200. * * *[75]

SECTION 5.—BREACH OF PROMISE.

SMITH v. WOODFINE.

(Court of Common Pleas, 1857. 1 C. B. [N. S.] 660.)

Action for breach of promise of marriage against defendant, a brewer, worth £100,000. Verdict for £3,000. Motion for a new trial on the ground of excessive damages.

WILLES, J.[76] The law as to breaches of promises of marriage is at least as old as the reign of William III, as appears by the case of Harrison v. Cage and Wife, Carth. 467, where, after verdict for the plaintiff, with £400. damages, it was moved in arrest of judgment, "because this action would not lie upon the promise of marriage made by the woman, for, the law doth not intend that the man is advanced by marriage, and therefore such a promise of marriage to him is of no consideration in law, and by consequence no action can be founded thereon; but 'tis otherwise where a man promiseth to marry a woman, because marriage in the eye of the law is an advancement to the woman." To which it was answered, and so resolved per curiam, "that here were reciprocal promises; and therefore, as her promise to him was a good consideration to make his promise obligatory, so by the same reason his promise to her was sufficient consideration to make her promise binding in this case as well as in any other mutual agreements." And the court "did not allow that distinction between the advancement of a man and of a woman in marriage." At the end of the case, the reporter adds this note: "Nota. It had been moved before for a new trial, because of the excessive damages; but, upon reference to the Chief Baron Ward, who tried the cause, he certified that the promise of the woman was well proved, and that the damages were more than he expected, but that he did not think them

[75] See, also, Limburg v. German Fire Ins. Co. of Peoria, ante, p. 70, note; Ashland M. F. I. Co. v. Housinger, 10 Ohio St. 10 (1859); Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418 (1860). A policy of life insurance is not a contract of indemnity, but an agreement to pay money on the happening of a given event. Trenton M. L. & F. Co. v. Johnson, 24 N. J. Law, at page 585 (1854); Dalby v. I. & L. A. Co., 15 C. B. 365 (1854). See Vance's Cases on Insurance.

[76] Part of the opinion is omitted.

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so excessive as to set aside the verdict." The report states that it was proved that the woman was worth £3,000. when the plaintiff courted her, and afterwards by the death of her brother worth double that sum. That which was laid down as law at that time is law at the present day. In Sedgwick on Damages (2d Ed.) p. 208, it is said: "The clear and irresistible result of the authorities, is, that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement." He then proceeds to notice an exception "in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title," And at page 210 he adds: "To the general rule another exception also exists, that of breach of promise of marriage. In this action, though in form ex contractu, yet, it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances, and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. 'The damages in this action,' says the Supreme Court of New York, in Southhard v. Rexford, 6 Cow. 254, 'rest in the sound discretion of the jury, under the circumstances of each particular case.' And this exception is perhaps one of the strongest proofs of the general rule." The learned author proceeds to cite American cases—Torre v. Somers, 2 N. & M. 267, Coryell v. Colbaugh, Coxe, 77, Stout v. Parll, Coxe, 79, Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672, and Hill v. Maupin, 3 Mo. 323—which, however, are only echoes of what has been decided in our courts. Again, at page 368, the learned author says: "The action for breach of promise of marriage, as has been already said, though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. Wells v. Padgett, 8 Barb. (N. Y.) 323. From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance (Southard v. Rexford, 6 Cow. [N. Y.] 254), subject, of course, to the general restriction that a verdict influenced by prejudice, passion or corruption, will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages. So, where it appears that the promise was made by the defendant with a view to seduce the plaintiff, this will be allowed to go to the jury in aggravation. Paul v. Frazier, 3 Mass. 73, 3 Am. Dec. 95; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Hill v. Maupin, 3 Mo. 323; Burks v. Shain, 2

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Bibb (Ky.) 341, 5 Am. Dec. 616; Whalen v. Layman, 2 Blackf. (Ind.) 194, 18 Am. Dec. 157; Wells v. Padgett, 8 Barb. (N. Y.) 323. The contrary has been held in Pennsylvania. Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159. But there the improper, cruel, and indecent conduct of the defendant will go to aggravate the damages. Baldy v. Stratton, 11 Pa. 316. So, also, it is held that the defendant may shew in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety or virtue, without any limitation of time whatever. Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102. It is also settled, that, in this action, dissolute conduct on the part of the female after the promise (or before if unknown) discharges the contract altogether. Indecent conduct before the promise, if unknown to the defendant, or after the promise goes in mitigation of damages. Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Palmer v. Andrews, 7 Wend. (N. Y.) 142; Irving v. Greenwood, 11 E. C. L. 412; Capehart v. Carradine, 4 Strob. (S. C.) 42. * * * Rule discharged.[77]

BERRY v. DA COSTA.

(Court of Common Pleas, 1866. L. R. 1 C. P. 331.)

Action for breach of promise. The plaintiff left her mother's home under the promise of marriage and resided at different lodgings with the defendant. Eventually she was cast off, and the defendant married another woman. Verdict for £2,500.

WILLES, J.[78] A rule is asked for in this case upon two grounds—first, that my Lord misdirected the jury,—secondly, that the damages are excessive. I am of opinion that there was no misdirection. I apprehend, that, in ascertaining the proper amount of damages in an action for a breach of promise of marriage, the jury are not limited to the mere pecuniary loss which the plaintiff has sustained, but may take into their consideration the injured feelings and wounded pride of a woman to whom such a wrong has been done. This has been so often laid down, that I will content myself with referring to a modern instance, the case of Smith v. Woodfine, 1 C. B. (N. S.) 660, in this court, where all the authorities upon the subject are cited and considered. The supposed misdirection consisted in the Lord Chief Justice's pointing out to the jury the contrast between the former position of the plaintiff as the daughter of an honest and respectable mother, and her present degraded condition as the defendant's cast-off mistress, and telling them that they might take that into their consid-

[77] Earlier cases are Gough v. Farr, 1 Younge & J. 477 (1827); Wood v. Hurd, 3 Scott, 368 (1836).

[78] Only the opinion of Willes, J., is here given, and the statement of facts is rewritten.

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eration in assessing the damages. It is impossible that the jury could have understood him to mean that they were to add to those damages a solatium for the outraged feelings of the mother and family of the plaintiff. If that had been the fair result of the summing up, undoubtedly it would have been a misdirection. The jury would have no right to consider that. The summing up amounts to this—that the damages which the plaintiff was entitled to, were, not merely the loss she sustained in not becoming the wife of a gentleman of property, but that she was also entitled to be compensated for the aggravation of that loss by reason of her prospects of marrying another being materially lessened. I put this in the driest language I can select. My Lord, no doubt, further intended to intimate to the jury that in estimating the amount of compensation due to the plaintiff for her injured feelings and wounded pride, they might legitimately take into their consideration the position of a young girl who had sustained an injury such as this defendant had inflicted upon the plaintiff in returning to her mother's house, not as a virtuous and respected member of the family, but compelled as it were to skulk into the home she had made desolate, without daring to lift her eyes to her parent's face. I use the word "injury" throughout, because the mode of estimating the damages in cases of this sort stands upon a totally different footing from that which obtains in the case of a breach of an ordinary contract to deliver or to accept goods. Then, as to the amount of damages, the court is called upon to exercise an exceedingly nice jurisdiction, and to interfere with that which is the peculiar and exclusive province of the jury so long as they are not misled by prejudice or gross mistake, or misconduct themselves. For that also I refer to Smith v. Woodfine, 1 C. B. (N. S.) 660. The jury there gave £3,000. damages; the motion took very much the same course as the motion has taken upon the present occasion; and the court lay it down that they will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives. It is not suggested that there has been any error or misconception on the part of the jury here, or that they have been influenced by any undue motives. The facts were all before them, and it was for them to pronounce their opinion upon them. It is suggested as a ground of misconduct on the part of the jury, that the damages they have given are, upon a view of all the circumstances, outrageously excessive and disproportionate to the justice of the case. We are not called upon to say whether or not we, if sitting in the place of the jury, would have awarded so much, or whether the substantial justice of the case would not in our opinion have been satisfied by a somewhat less amount. But we cannot shut our eyes to the fact that not only has the plaintiff lost the opportunity of marrying a gentleman in a position of life far superior to her own, and been deprived by the loss of her virtue of the opportunity of contracting a happy marriage with another man, but by

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the course taken at the trial imputations upon her character were unsparingly showered upon her. Indeed, every endeavor seems to have been made to shield the defendant by heaping charges and insinuations upon every one. Having chosen to take that course, I think it is not competent to the defendant now to complain that the jury have given a larger amount of compensation than they probably would have given if a different course had been pursued. I must own I think it was a case for very considerable damages; and I cannot say what the amount should have been, though the amount given is perhaps more than I should have felt disposed to give. Upon the whole, however, I see no ground upon which we can properly interfere.

OSMUN v. WINTERS.

(Supreme Court of Oregon, 1894. 25 Or. 260, 35 Pac. 250.)

See ante, p. 81, for a report of the case.

CHELLIS v. CHAPMAN.

(Court of Appeals of New York, 1891. 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.)

See ante, p. 483, for a report of the case.[79]

[79] Ames, J., in Grant v. Willey, 101 Mass. 356 (1869), said:

"The action in form is an action of contract; but the plaintiff, if she proved her case, was entitled to recover not merely an indemnity for her pecuniary loss and the disappointment of her reasonable expectations of material and worldly advantages resulting from the intended marriage, but also a compensation for wounded feelings and the mortification and pain which she had wrongfully been made to undergo, and for the harm that had been done to her prospects in life. Few, if any, of these elements of damage admit of precise arithmetical computation, or can be accurately measured by a pecuniary standard. From the nature of the case, they are peculiarly within the province of the jury, who are to form their judgment in the light of all the circumstances, whether of aggravation or extenuation, that properly belong to the case."

See, also, Burnett v. Simpkins, ante, p. 141; Vanderpool v. Richardson, ante, p. 481; Alberts v. Albertz, ante, p. 80, note; Finlay v. Churney, L. R. 20 Q. B. Div. 494 (1887); Southard v. Rexford, 6 Cow. 254 (1826); Kniffen v. McConnell, 30 N. Y. 285 (1864); Denslow v. Van Horn, 16 Iowa, 476 (1864); Douglas v. Gausman, 68 Ill. 170 (1873); Harrison v. Swift, 13 Allen (Mass.) 144 (1866).

In Coolidge v. Neat, 129 Mass. 146 (1880), an action of contract for breach of a promise of marriage, upon the question of damages the judge instructed the jury: That they were to be computed on the principle of indemnity and reasonable compensation. That, as elements of damage, the jury would have the right to consider: (1) The disappointment of the plaintiff's reasonable expectations, and to inquire what she had lost by reason of such disappointment, and, for that purpose, to consider, among other things, what would be the money value, or wordly advantage, of a marriage which would have given her a permanent home and an advantageous establishment. (2) The wound and injury to her affections. (3) Whatever mortification or distress of mind she suffered, resulting from the refusal of the defendant to fulfill his promise. That, in connection with the question how far she had

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SECTION 6.—ACTIONS AGAINST CARRIERS.

COLLARD v. SOUTHEASTERN RY. CO.

(Court of Exchequer, 1861. 7 Hurl. & N. 79.)

The plaintiff, a hop grower in Kent, had sold to Messrs. Crosier, of the Borough Market, London, eight pockets of hops, to be delivered at the Bricklayers' Arms Station, London, at £18. per cwt., according to sample. The hops were sent to the Pluckley Station on the defendants' railway on the 20th of October, consigned to Messrs. Crosier, whose carmen applied for them at the Bricklayers' Arms Station on the 23d of October, but was told that they could not be found. He applied again on the following day, and received the same answer. On the 29th of October he called again, and found them in an open van. On examination it appeared that the hops in some of the bags were partially stained, apparently from lying in a wet truck. On the same day the hops were removed to Messrs. Crosier's, who refused to receive them on account of their damaged condition; and by the custom of the hop market they had a right to reject them. The plaintiff caused them to be dried; and when salable, which was not until the 19th of November, sent them to a factor, who valued them at £8. per cwt. Between the 29th of October and the 19th of November the market price fell from £18. to £9. per cwt., and the damage to the hops caused a further diminution in value of £3. or £4.; but for actual use by a brewer the hops, when dried, were as good as ever. Evidence was adduced on the part of the defendant to prove that the quantity of hops actually damaged by the wet did not exceed eight pounds a pocket in six pockets, and that taking the value of the hops at £18. per cwt., the damage was covered by the amount paid into court.

been wounded in her affections or suffered mortification or distress, the jury might consider the length of time during which the engagement had subsisted. That if a female had been wantonly deserted, after an engagement of this kind, public policy as well as justice dictated the propriety of a legal indemnity, and if her affections had been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which might result by reason of such desertion, after a long courtship, were all matters for their consideration. At the defendant's request the judge also gave the following instruction: "It cannot be assumed that the defendant, by associating with the plaintiff, prevented her from forming any other marriage alliance or engagement to marry. The plaintiff might have had no other opportunity for marriage, and the defendant cannot be held responsible for merely possible damage." The jury returned a verdict for plaintiff in the sum of $3,000; and the defendant alleged exceptions. Ames, J., inter alia, said:

"The instructions given to the jury were carefully guarded, and appear to have been in exact conformity with the well-established rule in cases of this kind."

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The learned judge told the jury that the plaintiff was entitled to damages for the deterioration in the value of the hops by reason of the wet, and also in respect of the difference in value which occurred between the time when they ought to have been delivered and when they were rendered saleable by drying. The jury found a verdict for the plaintiff with £18. damages, beyond the amount paid into court, in respect of the depreciation in the quality of the hops, and £65. damages in respect of the depreciation in their value by reason of the fluctuation of the market. A verdict was entered for both those sums, and leave was reserved to the defendants to move to reduce the damages by the sum of £65.

Lush, in the following term (April 18th), moved for a rule nisi accordingly. He also moved, with respect to the £18. damages, for a new trial on the ground of misdirection. He submitted that inasmuch as the hops, when dried, were as good as ever for actual use, and the defendants had no notice that they were for sale, the plaintiff was only entitled to recover the value of the small portion actually damaged, and which was covered by the amount paid into court.[80]

MARTIN, B.[81] We are all of opinion that the rule ought to be discharged. The Lord Chief Baron, before he left the Court, requested me to state that he was of that opinion. It seems to me that the case is clear. We must assume that the hops were to be delivered in London on a certain day, and that by reason of the defendants' breach of duty they could not be delivered until another day. It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of £65. If that be not a direct, immediate, and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be. It is said that the defendants had no notice of the purpose for which the hops were sent to London, but I think that they must have known that they were sent for one of two purposes, either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit. It seems to me that Hadley v. Baxendale, 9 Exch. 341, has no bearing on this case; and I think that Smeed v. Ford was correctly decided. In my judgment the plaintiff is entitled to recover for this damage, because it is a direct and immediate loss consequent on the defendants' breach of duty. * * *[82]

[80] This statement is abridged from that found in the original report.
[81] Only part of the opinion of Martin, B., is here reprinted.
[82] See, also, O'Hanlan v. G. W. Ry., 6 Best. & S. 484.

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WATKINSON v. LAUGHTON.

(Supreme Court of New York, 1811. 8 Johns. 213.)

This was an action of assumpsit, on a bill of lading, signed by the defendant, as master of a ship. The cause was tried at the sittings in New York, before the Chief Justice.

The goods were shipped at Liverpool, in good order, consigned to the plaintiff. On the arrival of the ship in New York, it was found that several of the trunks had been opened, and the goods taken out; and it was admitted that the goods had been embezzled, or otherwise lost, without any fraud on the part of the defendant.[83]

PER CURIAM.[84] The rule of damages in such a case as the present, does not appear to have been the subject of discussion and decision in any of the numerous commercial cases which have arisen in the English courts. Perhaps the rule has been so well understood and settled in practice, as not to be drawn into controversy. But as that practice is not stated in the case, nor known to the court, we must govern ourselves by the general principles which are established in the books. The case, in this court, of Smith & Delamater v. Richardson, 3 Caines, 219, is not applicable, as that was not a case of loss, arising from the fraud, negligence or misfortune of the carrier, in the performance of his trust, for the defendant there never entered on the undertaking, and the suit was for a breach of contract in not carrying, and the plaintiffs, afterwards, became their own carriers, and lost the goods. There may then be a very material difference between the two cases, as to the reason and policy of the rule of damages. Here was an embezzlement of part of the goods, in the course of the voyage, and it would seem to be the rule of the marine law in such cases, that the master must answer for the value of the goods missing, according to the clear, net value of goods of like quality, at the place of destination. All the ordinances and authorities declare this to be the rule, when the goods are sold by the master, from necessity, in the course of the voyage (Abb. on Ship. pt. 3, c. 3, § 10); and why should not the same rule apply when the goods are missing by any other means? The general doctrine is, that the master must make good the loss or damage accruing to the goods which he undertook to carry safely, for hire; and Pothier (Charter Partie, Nos. 33, 35) says that the rule is general, and applies to all cases in which the master is responsible for missing goods. This is a sufficient authority for the rule, if there be no adjudged case or settled practice (and we know of none) to the contrary; especially, as the rule is in furtherance of the general policy of the marine law, which holds the master responsible, as a common carrier, for accidents, and all causes of loss, not coming within

[83] This statement is abridged from that of the official report.

[84] Part of the opinion is omitted.

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the exception in the bill of lading. It takes away all temptation to withhold a delivery of the goods, and exempts the shipper from the hard task of undertaking to detect, in every case, the negligence, fault, or fraud of the carrier; and it must be admitted that the rule would be highly just and necessary, if the loss was imputable to either of those causes. * * *

McGREGOR v. KILGORE.

(Supreme Court of Ohio, 1834. 6 Ohio 358, 27 Am. Dec. 260.)

See ante, p. 352, for a report of the case.

HARVEY v. CONNECTICUT & P. R. CO.

(Supreme Judicial Court of Massachusetts, 1878. 124 Mass. 421, 26 Am. Rep. 673.)

The plaintiff informed the defendant that he wished to make contracts with other persons in Boston to sell railroad ties, which he would transport to Boston by the defendant's line. The defendant thereupon, August 31, 1871, entered into a contract to carry such ties as plaintiff should furnish for one year at a certain figure. The plaintiff gave notice of his contracts in Boston in May, 1872. The defendant subsequently failed to transport the lumber presented to it for shipment by the plaintiff.

ENDICOTT, J.[85] * * * When a carrier receives goods for transportation, and fails to deliver them, the owner is entitled to recover the market value of the goods at the time and place at which they should have been delivered. Spring v. Haskell, 4 Allen, 112. And where the carrier negligently delays the delivery of goods, he is liable for loss in their market value during the delay. Cutting v. Railway Co., 13 Allen, 381. * * *

If, therefore, the defendant had received the ties for transportation according to its contract, and failed to deliver them at all, it would have been liable for their market value in Boston at the time when they should have been delivered; or if it had negligently delayed the delivery, it would have been liable for the diminution in their market value during the delay. It would not, in either event, have been liable in damages for loss of profits sustained by the plaintiff under his subsequent contracts with other parties; unless it can be said that, by reason of the plaintiff's announcement that he intended to make such contracts, it was necessarily within the contemplation of the parties when they made the contract of transportation, and as the probable consequence of its breach, that the defendant might be liable for dam-

[85] Part of the opinion is omitted, and the statement of facts is rewritten.

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ages resulting to the plaintiff from his inability to fulfill such contracts, the terms of which were not and could not then be disclosed.

The damages, for which a carrier is liable upon failure to perform his contract, are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation; and a larger liability can be imposed upon him, only when it is in the contemplation of the parties that the carrier is to respond, in case of breach, for special and exceptional damages. In such a case, the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant, that the plaintiff intended to make contracts for the sale of the ties to be transported, cannot impose a liability upon the defendant for loss of profits on such contracts. * * *

We are therefore of opinion there was error in instructing the jury that the plaintiff could recover damages for loss of profits on his subsequent contracts. As the ties were not sent to Boston, the true measure of damages is the difference between the market price in Boston and the market price in Canada at the time when the defendant should have transported the ties according to its contract, deducting therefrom the price stipulated in the contract for transportation. * * *

ILLINOIS CENT. R. CO. v. SOUTHERN SEATING & CABINET CO.

(Supreme Court of Tennessee, 1900. 104 Tenn. 568, 58 S. W. 303.)

The Cabinet Company entered into a contract with the rector of St. John's Episcopal Church at Petersburg, Va., to manufacture and put in certain church pews at a cost of $524; the agreement containing a provision for liquidated damages at $10 per day for each day of delay after May 6, 1898. The pews were shipped over the defendant railroad company's lines; its agent being notified of the nature of the contract with the church. The pews arrived 24 days late, and the cabinet company settled with the church for $344; a deduction of $180 being made for the delay.

CALDWELL, J.[86] * * * Where property is shipped to market for general sale to such purchasers as may be obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages for that default is the depreciation in salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive. Railroad Co. v. Hale, 85 Tenn. 69, 1 S. W. 620; Hutch. Carr. § 771; 3 Wood Ry. Law, 1607. But, if the property is sold at an advanta-

[86] Part of the opinion is omitted, and the statement of facts is rewritten.

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geous price before shipment, on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and through negligence fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which it was conditionally sold before shipment. Deming v. Railway Co., 48 N. H. 455, 2 Am. Rep. 267; Hutch. Carr. § 772. The difference between the modes of measuring the carrier's liability in the two cases is due to the difference between its obligations and the consequences of their breach. In the former case the obligation is general, and the loss and liability are general, while in the latter case the obligation is special, and the loss and liability are special. Referring to the carrier's responsibility for the breach of a special contract by delay, a distinguished author has said: "But if the intended use and application of the goods to be carried were expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of both parties to the contracts, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract." 3 Wood, Ry. Law, 1607.

The contract, breached by the defendant, now before the court, was undoubtedly a special one. The pews in question were manufactured after a peculiar design, for a particular church, under a particular contract, of which the defendant was distinctly notified at the time it accepted them for carriage. The contract of carriage being special, the liability for its nonobservance was likewise special, and the plaintiff was entitled to recover all damages naturally resulting from the breach, whatever the amount may have been. The trial judge, in that portion of the charge heretofore quoted, instructed the jury, in substance, that the proper measure of the plaintiff's recovery, if any should be allowed, would be the penalty of its contract with the consignee for the period the pews were delayed beyond the time therein stipulated as the required date of delivery, which, the record shows, amounted to $180, the sum actually deducted by the consignee from the purchase price of the pews. That was certainly the amount of the plaintiff's real loss, and, in view of the notice given at the time of the shipment, it may fairly and reasonably be assumed to be the exact extent of the injury which the plaintiff and the defendant contemplated as the natural result of so long a delay in the delivery of the pews, and therefore the true measure of damages recoverable for the breach. * * *

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DEVEREUX v. BUCKLEY et al.

(Supreme Court of Ohio, 1877. 34 Ohio St. 16, 32 Am. Rep. 342.)

GILMORE, J.[87] The action in the court of common pleas was not brought upon any express or special contract, but to recover damages for a breach of an implied agreement to carry, and deliver at the place of consignment, a large lot of eggs, within a reasonable time, by a common carrier. * * *

It may be safely said that if a common carrier is chargeable with knowledge that the article carried is intended for the market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will, in the absence of any special contract, constitute the measure of damages.

Was the carrier chargeable with such notice in this case? We think he was. The anxiety of the plaintiffs to obtain quick time on their shipments of eggs, which was communicated to the defendants' agent, shows that, for some reason, they regarded "time" as an important element in the shipments. * * * And the reason why both parties recognized the necessity of quick time in the transportation of the article, was that they undoubtedly knew that in this country the market value of eggs was liable to decline at the season of the year in which the shipment was made in this case, and the damages consequent upon such a decline must have been in the contemplation of both parties at the time the contract was made. * * *[88]

[87] Part of the opinion is omitted.

[88] See, also, Hadley v. Baxendale, ante, p. 189; B. & O. R. R. v. Carr, ante, p. 67; Green-Wheeler Shoe Co. v. C., R. I. & P. R. R. Co., ante, p. 171; Horne v. Midland R. R. Co., ante, p. 195; Ward's C. & P. Co. v. Elkins, ante, p. 240; Harris v. Panama R. R. Co., ante, p. 341; Williams v. Vanderbilt, 28 N. Y. 217 (1863); McKinley v. C. & N. W. R. R. Co., 44 Iowa, 314 (1878); Le Blanche v. L. & N. W. Ry., L. R. 1 C. P. Div. 286 (1876).

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